Supreme Court, U.S.
FILED
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IN THE

United States Supreme Court

October Term, 1970

No. 343

MARSHALL P. SAFIR, and SAPPHIRE STEAMSHIP LINES, INC.,

Petitioners,

vs.

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,

Respondents,

AMERICAN PRESIDENT LINES, LTD., PRUDENTIAL LINES, INC. and GRACE LINE, INC. (now operating as "Prudential-Grace Lines, Inc."), and FARRELL LINES, INC., AMERICAN EXPORT ISBRANDTSEN LINES, INC., BLOOMFIELD STEAMSHIP CO., LYKES BROS. STEAMSHIP COMPANY, INC., MOORE-McCORMACK LINES, INC., and UNITED STATES LINES, INC.,

Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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212 PL 7-1053

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IN THE

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OCTOBER TERM, 1970

No. .....

MARSHALL P. SAFIR, and SAPPHIRE STEAMSHIP LINES, INC.,

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vs.

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, JAMES S. DAWSON, JR., Secretary, Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce, and MAURICE STANS, Successor to and Substituted for C. R. SMITH, Secretary of Commerce of the United States,

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Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 26, 1970 (18a).

Opinions Below

The opinion of the District Court is not reported (19a). The opinion of the Court of Appeals is not yet reported officially (7a). (This opinion is a sequel to the opinions of the District Court reported in 297 F. Supp. 630 sub. nom *Safir v. Gulick* (79a), reversed by the Court of Appeals in 417 F. 2d 972 (1969) (70a).) The opinion of the Court of Appeals denying petitions for rehearing by intervenors is not yet reported officially (1a).

The opinion of the Federal Maritime Commission, Docket No. 65-13, is reported in 11 F. M. C. 263 (22a).

Jurisdiction

The judgment of the Court of Appeals was entered on February 26, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1). The time to file this petition was extended to July 24, 1970 by order of Mr. Justice Harlan dated May 12, 70 (6a).

Subsequent to the rendition of the February 26, 1970, judgment by the Court of Appeals, intervenors who are subsidized carriers of the Atlantic and Gulf American Flag Berth Operators Conference (AGAFBO) moved in the Court of Appeals for leave to intervene, to file a petition for rehearing with respect to the portions of the decision adverse to them and for a stay of the mandate. The motions of the intervenors were granted by the Court of Appeals by order dated March 25, 1970. Thereafter petitioners moved to vacate the said orders of intervention. Intervenors cross-moved to extend their time to file their petitions for rehearing. The Court by orders

dated April 9, 1970, denied petitioners' motion to vacate the orders of intervention, granted the cross-motion and extended the time of intervenors to file their petition for rehearing to and including May 4, 1970. The Court of Appeals denied the petitions for rehearing on June 18, 1970 and also denied the petitions to have the Court of Appeals rehear the case *en banc* (4a, 5a).

Questions Presented

1. Whether the Respondents United States Government officials in charge of the Administration of the Ship Subsidy program are under an unconditional mandatory duty imposed by Sec. 810 of the Merchant Marine Act, 1936, 46 U. S. C. Sec. 1227, to recover subsidies paid for a period of eleven months where the U. S. Court of Appeals for the Second Circuit has determined that the subsidized members of the Atlantic and Gulf American Flag Berth Operators Conference (AGAFBO) violated Sec. 810 of the Merchant Marine Act, 1936, 46 U. S. C. Sec. 1227 during this eleven-month period.

2. Whether the restoration of the rates to their former levels by the intervenor carriers (who are members of AGAFBO which violated Sec. 810 of the Merchant Marine Act of 1936) without more, constitutes a return to the paths of virtue which the Court of Appeals held was a prerequisite to avoiding the mandatory directive of the Statute prohibiting further payments of subsidies to the offending carriers?

3. Whether the intervenor carriers (who are members of AGAFBO which have violated Sec. 810 of the Merchant

Marine Act of 1936) are entitled at any time to receive subsidy payments after they violated the statute?

4. Whether the sanctions of §10 of the Merchant Marine Act should be imposed against all the subsidized members of AGAFBO jointly and severally or limited in accordance with the criteria indicated in the June 18, 1970 opinion of the Court of Appeals denying the Intervenors' petitions for rehearing?

Statute Involved

Sec. §10 of the Merchant Marine Act, 1936, 46 U. S. C. 1227 provides so far as pertinent:

> "It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section."

Statement of the Case

In this case the members of AGAFBO acted in a manner to destroy Sapphire Steamship Lines, Inc. which was a nonsubsidized American flag ocean carrier operating a liner service between United States and European ports. AGAFBO did this by a series of pervasive acts of a primitive, predatory nature constituting an abuse of the subsidy program which are set out in the opinion of the F. M. C. (22a, 47a, 52a, 53a, 54a, 60a, 61a-65a).

On May 6, 1965 the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration), on its own motion instituted an investigation of the practices surrounding the procurement of ocean transportation of the United States military cargoes. On December 12, 1967, the Federal Maritime Commission filed its decision Docket #65-13 in which it found and concluded as follows concerning the rates of AGAFBO (60a):

> "2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).*
>
> 3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were

---

*The sections referred to are sections of the Shipping Act of 1916 (46 USC 817 et seq.).

detrimental to commerce and contrary to the public interest.

5. U. S. Lines, by canceling a booking because MSTS patronized Sapphire, retaliated against MSTS in violation of section 14 Third. Moore-McCormack, however, simply remonstrated with MSTS about its policy and did not violate section 14 Third."

The decision became final when the carriers did not appeal.

We note the following excerpts from the Maritime Commission decision:

At pages 47a, 48a—

"There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and therefore, contrary to section 18(b)(5) of the Act."

At pages 53a, 54a—

"The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which

was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its rate-making functions, operated in a manner which was knowingly at odds with the requirement of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act."*

When the decision of the Federal Maritime Commission became final the defendants who administer the payment of the subsidies on behalf of the government were requested by the plaintiffs to desist from making further payments of subsidies and to take appropriate action to recover those already paid. The defendants took no action whatever and continued to pay subsidies (71a, 72a).

Accordingly, this action was instituted in the U. S. District Court for the Eastern District of New York for (1) a judicial declaration adjudicating that the payment of subsidies to the members of AGAFBO was illegal and in violation of Sec. 810, Merchant Marine Act 1936, 46 USC 1227, (2) that the defendants be enjoined and prohibited from continuing to make such subsidy pay-

* See also separate opinion of Chairman Harlee and Commissioner Barrett concurring, holding flatly AGAFBO engaged in a conspiracy to destroy Sapphire F. M. C. Docket No. 65-13 at Pages 55a-59a.

ments, and (3) that the defendants be directed to recover the subsidy payments already illegally paid (72a, 73a).

Jurisdiction in the District Court was based on 46 U. S. C. 1227 (Sec. 810, Merchant Marine Act, 1936); 5 U. S. C. 702 et seq. (the agencies generally); 28 U. S. C. 2201, 2202 (Declaratory Judgment); 28 U. S. C. 1361 (Jurisdiction); 28 U. S. C. 1337 (Commerce) (73a, 86a).

Proceedings Below

The defendants moved to dismiss the complaint and for alternative relief before answer. The plaintiffs cross-moved for summary judgment. Judge Dooling granted the defendants' motion to dismiss the complaint and did not pass on any of the other motions (297 F. Supp. 630) (79a).

Petitioners appealed to the Court of Appeals for the Second Circuit. That Court reversed the order and judgment of the District Court and remanded the cause for further proceedings consistent with the opinion of the Court (417 F. 2d. 972 (1969)) (70a-79a).

The Court of Appeals held that the complaint stated a valid cause of action but limited the relief, erroneously we submit, by ruling (1) that Section 810 of the Merchant Marine Act of 1936 does not bar violators from receiving subsidy payments now and after "their return to the paths of virtue" and (2) that the Maritime Administrator has a limited reviewable discretion, whether to recover the subsidies paid to violators in the past as distinguished from current payments. "Return to the paths of virtue" was not elucidated in the opinion.

On October 24, 1969, the Maritime Administration and the Maritime Subsidy Board (hereinafter MARAD) is-

sued an order, Docket No. S-243, directing its Chief Hearing Examiner to hold hearings, the stated purpose of which was to "compile a public record which will provide the basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U. S. C. 1227) has been violated and the appropriate action that should be taken" (66a, 68a).

Deeming that this was not consistent with the Court of Appeals opinion and that MARAD had demonstrated that it never had any intention to enforce the sanctions contained in Section 810 of the Merchant Marine Act, 1936 against the offending carriers of AGAFBO and that the commencement of the proposed hearing on an issue that had already been decided by the Court was proof of MARAD's intention to flout the order of the Court, petitioners moved in the District Court for an injunction to immediately compel MARAD to suspend the payment of operating and construction differential subsidies to the offending carriers. The fact is that nothing had changed since the Appeal Court's first decision except that MARAD had now embarked on a course of administrative attrition vis-a-vis these petitioners while at the same time pretending that MARAD was complying with the order of the Court. Judge Dooling denied the motion (19a, 20a, 21a).

(On the same day that Judge Dooling signed plaintiffs' order to show cause for the hearing on the injunction, MARAD filed a formal answer to the complaint wherein it alleged that the proposed hearing was a compliance with the Court's order and that the action should be dismissed as moot.)

Petitioners again appealed to the Court of Appeals for the Second Circuit. That Court modified and affirmed as modified, the order of the District Court. It held that the injunction application to compel MARAD to suspend the payment of operating and construction differential sub-

sidies to the offending carriers—intervenors-respondents here—was properly denied. However, it further held that Section 810 of the Merchant Marine Act of 1936 had been violated by the carriers and directed the District Court to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO's carriers concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire (17a). The Court of Appeals reaffirmed the latter ruling in denying the intervenors-carriers application for rehearing even though the Department of Justice filed a brief in support of their petition.

Reasons for Granting the Writ.

Certiorari should be granted because important questions of Federal law in the administration of the Federal Ship Subsidy Program have arisen which have not been, but should be, settled by this Court.

Sec. 810 of the Merchant Marine Act, 1936, 46 USC Sec. 1227 has never been construed or applied by this Court or any other Court except the Courts involved in this case. This case is one of first impression. Judge Friendly stated in the first opinion (74a):

> ". . . It is unfortunate—though not surprising—that Sec. 810 does not deal expressly with a situation where the Maritime Administrator refuses to take steps concerning subsidy payments to violators; since it does not, we must analyze the statutory scheme as a whole and the legislative history of the Act to arrive at a judgment of what Congress would have wanted done if this problem had occurred to it. . . ."
>
> ". . . We deal here with an issue requiring reconciliation of two conflicting statutory purposes—the

> general policy of the act to build up the American Merchant Marine through subsidy payments and the direction of Sec. 810 for withdrawal of those subsidies when they are used to hurt rather than help."

Our contention is that the judgment of the Court of Appeals should be modified by directing the issuance of an injunction suspending the payment of subsidies until the violators who are presently receiving subsidies satisfactorily demonstrate that the subsidies should be restored.

It should be held by this Court:

(1) that the violators of Sec. 810, the intervenors-respondents must at least refund the subsidy payments they received during the eleven month period. There is no discretion to waive the refunds.

(2) that the mere cessation of the predatory activities which forced Sapphire out of business does not by itself constitute the return "to the paths of virtue" required; that the payment of subsidies to the carriers from March, 1965, even to the present day is illegal under the circumstances in this case.

(3) that the Maritime Administrator does not have any discretion whatever to waive the recovery in whole or in part of any subsidy payments made while the carriers were violating the statute.

(4) that Section 810 states that two forms of conduct are unlawful:

> (1) "to continue as a party to or to conform to any agreement with another carrier or carriers by water."
>
> (2) "or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair."

In the petitions for rehearing, four of the carriers self-styled themselves "non-trade" intervenors. Our submission is that they fall squarely within the first category of the unlawful conduct whether or not they voted on the pertinent rate issues. Since the Statute is clear, it should not be emasculated under the guise of construction so as to release the self-styled non-trade intervenors from liability. The only thing that should exculpate a member of a conference is the resignation of a member from the conference which would constitute an election not to "continue as a party and conform to this agreement."

The construction of Section 810 by the Court of Appeals severely limits the operative efficacy of the sanctions in the Statute to deter violators. As so construed, once Sapphire or any other competitor is eliminated by predatory tactics, the violations cease, not because of any desire to repent on the part of the violators, but because there is no longer any need for the violators to employ their predatory devices to kill their competitors. Then the rates are restored to their prior legal level. At the worst the offenders face only the possibility of a penalty or fine being levied and, at best, having the proceeding mooted if the victim does not bestir the authorities to action. Thus the sanctions in Section 810 become a dead letter instead of a viable weapon in the preservation of competition. Five of the intervenors settled for only $165,000 for their violations of the Shipping Act of 1916. This occurred only after this action was commenced and after the first opinion of the Court of Appeals was announced in an eleventh hour attempt to forestall the collateral estoppel effect of the F. M. C. decision. This was five years subsequent to the violation.

Congress provided the remedy in the statute in the plainest of language that even business executives can understand without the advice of lawyers, if only they will it. But of course, rather than face up to the penalty, they expound the humbug that Congress did not mean what it

said in the statute. But all the legalistic abstractions, mumbo jumbo and dialectics cannot obscure the declared intent and meaning of the statute.

The foregoing is clear from the plain language of the Statute. It is also confirmed by the statements of Senators O'Mahoney and Copeland made immediately prior to enactment of Sec. 810 (Congressional Record, Vol. 80, Part 9, 74th Congress, 2d session, Page 9922, June 18, 1936):

> "Mr. O'Mahoney: It seems to be conceded that in considering a subsidy to be paid to shipping concerns for the purpose of building them up we should permit a condition to exist which apparently would result in tearing down American shipping. I certainly hope the Senator from New York will do more than receive an amendment of this kind if the facts explained by the Senator from Missouri (Mr. Clark) are correct.
>
> "Mr. Copeland: Mr. President, it dawns on me now that the Senator has in mind a complaint which has been referred to one of the standing subcommittees of the Commerce Committee to deal with exactly that problem, because it has to do with freight on certain articles where such a condition has existed. So far as that is concerned, I will go with the Senator down to the gates of the infernal region to correct that condition.
>
> "Mr. O'Mahoney: Would it not be a simple matter to provide by amendment that no subsidy of any kind or character shall be paid to any shipping line or shipping concern which has entered into an arrangement to destroy any other American line?
>
> "Mr. Copeland: Let us find out. I will consult the experts and see if they can choose language to cover what the Senator has in mind."

The Court of Appeals' decision opens an escape hatch for the violators and MARAD by stating the following in a footnote to its opinion (17a):

> "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom."

Thus, the Court of Appeals' decision gives lip-service to the Statute while at the same time withholding any meaningful relief. It is "a teasing illusion, like a munificent bequest in a pauper's will" (Mr. Justice Robert H. Jackson). Without indulging in any ingenious wrenching of its words, the statute clearly means, that "no payment or subsidy of any kind should be paid directly or indirectly" to any one who violates Section 810 of the Act.

Contrary to the Court of Appeals' decision, the recovery of all subsidies paid during the period of violation is not a "far fetched interpretation" of the law. It is the law's minimum requirement. The Statute does not say no subsidy shall be paid only if the violators fail to return to the paths of virtue or only if and when the Maritime Administration decides that there has been a violation and that in its discretion it deems it appropriate to recover the subsidies theretofore paid.

District Judge Dooling stated that questions must necessarily arise in invoking the "seemingly simple command of a single brusque sentence" that the literal reading of the sentence prohibits any subsidy payment to a carrier who violates the section and that the statute "by the very rigor of its terms presents problems of interpretation" (84a). He was reluctant to accord the statute its plain meaning because of the consequences it entailed. We also

discern a similar reluctance, albeit to a lesser degree, in the Court of Appeals. The reluctance is unwarranted both as a matter of law and policy.

The fact that these steamship companies may be hurt by the recovery of these subsidies is no reason not to enforce the law. So far as the rule of statutory construction is concerned, the Court in *Crooks v. Harrelson*, 282 U. S. 55, 60 stated as follows:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."

CONCLUSION

The substantial questions of Federal law involved have never been decided by this Court. Their proper and authoritative resolution which only this Court can provide will result in meaningful enforcement of the statute. The petition for certiorari should be granted.

July 13, 1970

Respectfully submitted,

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Opinion of United States Court of Appeals for the Second Circuit

✦

No. 552—September Term, 1969.

(Decided June 18, 1970.)

Docket No. 34355

✦

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and FEINBERG, *Circuit Judges*.

On Petitions of Intervenors for Rehearing

PER CURIAM:

In our decision of February 26, 1970, —— F.2d ——, slip opinions 1697, we directed the district court "to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire." Shortly thereafter, the AGAFBO lines, which, although fully aware of this action, had been sedulously abstaining from participation, see 417 F.2d 972, 976 n. 4 (1969); —— F.2d at ——, sought leave to intervene for the purpose of seeking a rehearing on that portion of our decision. We granted such leave, received petitions and accompanying briefs, and then called upon counsel for the appellants and appellees to respond.[1]

[1] We requested counsel for the appellees to obtain the views of the Federal Maritime Commission. The latter, taking no position with respect to other issues, has advised "that its sole concern here, in the context of its responsibilities under the Shipping Act, is to insure that the finality of its determinations is preserved and that its factual findings will not be litigated long after the statutorily prescribed time for judicial review has run and in proceedings to which it is a stranger." This was the precise objective of our decision.

Opinion of United States Court of Appeals for the Second Circuit

The argument most strongly pressed by the intervenors is that they had no sufficient incentive and, indeed, no opportunity to appeal the adverse findings of the FMC, see —— F.2d at ——, slip opinions at 1705. The latter branch of the argument hangs mainly on the fact that the rates found by the FMC to give rise to a violation of §15 of the Shipping Act had expired and therefore could no longer be disapproved under §18(b)(5). But §15 subjects offending lines to a penalty of $1000 per day of violation. Since the FMC's determination would be conclusive in a civil action for penalties, it was therefore clearly appealable. See *Pacific Far East Line, Inc.* v. *FMC*, 410 F.2d 257 (D.C. Cir. 1969). In view of the sharp tone of the FMC report and the even sharper one of the separate opinion of two members, the intervenors could hardly have taken lightly the threat of the Government's suing for a penalty; indeed, we are informed that five of them have recently settled their liability by paying $25,000 each. Moreover, while we relied mainly on this point, —— F.2d at ——, slip opinions at 1705, we did not at all mean to suggest that the AGAFBO lines should not have been aware of the possible effect of the FMC determination in a proceeding under §810 of the Merchant Marine Act, of whose potentiality they were apprised very shortly after the FMC decision.

The Government makes the point that if appellants wished to have the Maritime Subsidy Board give conclusive effect to the FMC decision, the Board has a procedure enabling them to raise this matter *in limine*. They could have moved for a summary disposition of the issue by the Hearing Examiner, 46 C.F.R. 201.91, could have requested permission from him to appeal an adverse decision to the full Maritime Administration, 46 C.F.R. 201.93, and if that were granted and the appeal proved unsuccessful, could have sought further review by the Secretary of Commerce, 46 C.F.R. 202.1. Be all this as it may, we were faced with

a statement by the district judge implying that the FMC determination did *not* have binding effect, —— F.2d at ——, slip opinions at 1699-1700, and, after two and a half years, we see no point in launching appellants on the wearisome course the Government has plotted when we are clear that the legal issue must be decided in their favor. The short of the matter is that nothing advanced by the intervenors or the Government alters our conclusion that "it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong in a fully litigated issue the decision of which Congress had confided to it." —— F.2d at ——, slip opinions at 1705.

Two minor points should be mentioned. Four intervenors, American President Lines, Ltd., Prudential Steamship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the Maritime Administration; we said nothing about who was responsible for these and, by a footnote 2, emphasized that "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action . . ." On the other side, the Government is fearful lest "the tenor of the opinion and the rationale underlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC, that a wider conspiracy existed." But there was no "majority" finding on the issue of a wider conspiracy, since the four participating members divided two to two. The issue therefore remains open.

The intervenors' petitions for rehearing are denied.

Order Denying En Banc Hearing (Prudential Steamship Company, Inc.)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

MARSHAL P. SAFIR, ARNOLD WEISSBERGER, and SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

v.

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration,

Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., et al.,

Intervenors.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by by counsel for intervenors Prudential Steamship Company, Inc., and Prudential-Grace Lines, Inc., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

June 18, 1970

Order Denying En Banc Hearing (American Export Isbrandtsen Lines, Inc.)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

MARSHAL P. SAFIR, ARNOLD WEISSBERGER, and SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

v.

ANDREW GIBSON, Successor to and Substituted for JAMES W. GULICK, Acting Maritime Administrator, Maritime Administration, et al.,

Defendants-Appellees,

AMERICAN EXPORT ISBRANDTSEN LINES, INC., et al.,

Intervenors.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by by counsel for intervenors American Export Isbrandtsen Lines, Inc., et al., and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

June 19, 1970

Order Extending Time to File Certiorari Petition

Copy

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1969

✦

MARSHALL P. SAFIR and SAPPHIRE STEAMSHIP LINES, INC.,

Petitioners,

vs.

ANDREW GIBSON, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 24th, 1970.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 12th
day of May, 1970.

Opinion of United States Court of Appeals for the Second Circuit, February 26, 1970

FRIENDLY, *Circuit Judge*:

This appeal is a sequel to our decision in *Safir* v. *Gibson*, 417 F.2d 972 (1969), where we held that under §810 of the Merchant Marine Act, 1936, 46 U.S.C. §1227, the Maritime Administration was "required to make a considered decision whether to recover the subsidies paid in the past" to members of AGAFBO who had been found by the Federal Maritime Commission (FMC) to have violated §15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814. Rates on U. S. Government Cargoes, Docket No. 65-13, 11 F.M.C. 263 (1967). After our decision was handed down, the Maritime Subsidy Board of the Maritime Administration initiated a proceeding, Docket No. S-243, on October 24, 1969, directing its chief hearing examiner to conduct an investigation and compile a public record "which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. §1227), has been violated and the appropriate action that should be taken." Steamship lines that were members of AGAFBO and received operating-differential subsidies during the period of the violations and the plaintiffs here were named as parties. Dissatisfied with this procedure, plaintiffs moved the District Court for the Eastern District of New York to issue an injunction restraining the defendants "from making any further payments of operating or construction differential subsidies to the members of AGAFBO which have violated Sec. 810 of the Merchant Marine Act, 1936", and to grant other appropriate relief. Judge Dooling denied the motion in all respects.

Insofar as the district court refused to enjoin current subsidy payments, its action was clearly consistent with our opinion, indeed compelled by it. We said we did not believe that §810 protected "the interest of a carrier in

having former violators barred from ever receiving subsidy payments despite their return to the path of virtue," and sharply distinguished making current payments to former violators from refusing to seek recovery of payments during the violation, 417 F.2d at 977. Plaintiffs do not charge that the AGAFBO members now receiving subsidy payments are violating §810 or indeed that they have done so since March 1, 1966. The argument that these carriers will not have returned "to the path of virtue" until they have refunded all subsidy payments received during the period of violation is a far-fetched misreading of our decision.

On the other hand, while the district court was literally correct in its conclusion that we "did not find that Section 810 had been violated, or that a finding of a violation of Section 15 is a finding of a violation of Section 810. . . ," the primary reason why we did not do the latter was that the question was not raised. We called attention to the failure of the AGAFBO lines to seek intervention and rather pointedly invited them to do so, 417 F.2d at 976 n. 4. Their decision to remain on the sidelines should not prevent us from making a decision that will spare the plaintiffs the necessity of going through a costly and time-consuming redetermination of matters that have already been heard and decided by the agency having authority in the premises.

Section 810 of the Merchant Marine Act, 1936, makes it unlawful.

> for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to

> conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

Section 15 of the Shipping Act directs the Commission to disapprove any agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports . . . or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter. . . ." Section 18(b)(5), 46 U.S.C. §817(b)(5), added in 1961, 75 Stat. 764, directs the Commission to disapprove "any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." A finding by the FMC that the rates of the AGAFBO members were unjustly discriminatory or unfair as between carriers would thus determine the same conduct as would constitute a violation of §810, subject only to proof that the AGAFBO lines were receiving operating-differential subsidies at the time and that the carrier adversely affected was a "citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established route from and to a United States port or ports."

When we turn to the discussion by the FMC in Docket No. 65-13, Rates on U. S. Government Cargoes, 11 F.M.C. 263, 279, 283 (1967), we find the following:

> We consider now the AGAFBO reduced rates which became effective March 29, 1965. As previously seen, MSTS was informed by AGAFBO that the reductions were temporary and for competitive purposes only, and that they were not believed to be fair, reasonable, or compensatory. There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act.
>
> Thus we will consider whether the rate reductions offended the provisions of section 15. AGAFBO itself characterized its reduced rates as unreasonably low. The operating data submitted by AGAFBO show that this admission was accurate. The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the

> AGAFBO agreement, through its rate-making functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. Isbrandtsen Co., Inc. v. United States, 211 F.2d 51 (D.C. Cir. 1954) cert. denied, 347 U.S. 990 (1954). We therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.

The Commission's "Ultimate Conclusions" included, 11 F.M.C. at 287:[1]

> 2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).
>
> 3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated

[1] Two of the four members who participated would have gone further and have held that AGAFBO's anticompetitive activities against Sapphire went beyond the scope of the conference agreement and violated §15 on that ground. 11 F.M.C. at 288-90.

section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

4. AGAFBO did not otherwise violate the Shipping Act.

The only basis we can perceive for arguing that the FMC's findings did not determine that AGAFBO's rates were "unjustly discriminatory or unfair" to Sapphire is that, rather than make an explicit finding to that effect, it chose to place decision on the ground that AGAFBO violated section 15 by knowingly and willfully setting rates which "were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act." But to rest anything on that would be hypertechnical. The reason why the rates were found to be "so unreasonably low as to be detrimental to the commerce of the United States" was because the reductions "were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade." 11 F.M.C. at 279. The FMC's refusal to find that the AGAFBO lines "conspired to drive Sapphire from the trade in violation of section 15," 11 F.M.C. at 282, and its fourth conclusion, "AGAFBO did not otherwise violate the Shipping Act," do not justify a contrary result. Section 810 is violated not only when an agreement by a subsidized carrier is unjustly discriminatory or unfair to another American-flag carrier but when such carriers "engage in any practice in concert with another carrier or carriers by water" having that effect. While "practice" covers matters other than rates, see *California* v. *United States*, 320 U.S. 577 (1944), the framers of 810 surely thought that the fixing of unjustly

discriminatory or unfair rates aimed at an American-flag carrier pursuant to a conference agreement would constitute a "practice." See *Empire State Highway Ass'n* v. *F.M.B.*, 291 F. 2d 336, 339 (D.C. Cir), *cert. denied*, 368 U.S. 931 (1961); compare *F.M.C.* v. *New York Terminal Conference*, 373 F. 2d 424, 427 (2 Cir. 1967).

Since the AGAFBO lines and Sapphire were parties to the FMC proceeding and the FMC was there the authorized representative of the United States as the Maritime Administrator is in the case now pending, see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), any "privity" that may be required for giving the FMC's determination the effect of collateral estoppel in the Maritime Administration proceeding exists. The Supreme Court has recently observed that "language to the effect that res judicata principles do not apply to administrative proceedings . . . is certainly too broad" and that "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate the courts have not hesitated to apply res judicata to enforce repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). While the issues here may not have been purely factual, they were fully litigated before the agency designated to determine them. Cf. *Tampa Phosphate R.R.* v. *Seaboard Coast Line R.R.*, 418 F. 2d 387, 396 (5 Cir. 1969). The Restatement of Judgments, §70, says that even determinations of questions of law are conclusive between the parties on a different cause of action unless injustice would result. The only possible injustice we can perceive from giving the FMC's determinations the effect of collateral estoppel in the Maritime Administration case arises from the fact that, in view of the relatively slight sanctions imposed in Docket No. 65-13,

11 F.M.C. at 288, namely, required modifications in the conference agreement, the AGAFBO carriers had no sufficient incentive to seek judicial review. However, the Commission's finding that AGAFBO violated section 15 of the Shipping Act subjected the member lines to a potential liability of $337,000 each under that section, and supplied ample motive for them to seek judicial review even if they did not anticipate the possible use of the FMC's conclusions in a subsequent Maritime Administration proceeding.

It is the FMC, not the Maritime Administration, that has the expertise to pass on whether rates are unfair or unduly discriminatory, cf. *Far East Conference* v. *United States*, 342 U.S. 570 (1952), and it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it, see 2 Davis, Administrative Law Treatise §18.12 at 626 (1958). Any objection on the ground that two different statutes are involved, see *id.* §18.04 at 576-80, is more than overcome in this case by the point that when Congress enacted §810, the administration of subsidies was entrusted to the same agency, the United States Maritime Commission, that was to enforce the Shipping Act. See 46 U.S.C. §1111, Historical Note, and our earlier opinion, 417 F. 2d at 975 n. 2. The 1936 Congress would hardly have expected that after the USMC had found that rates were unjustly discriminatory and unfair while wearing its Shipping Act hat, it would reexamine that conclusion on assuming its hat under the Merchant Marine Act, 1936. The separation of functions in 1950, whereby authority on rate matters passed to what is now the Federal Maritime Commission, should not alter the result.

We recognize there is a general rule against judicial interference with administrative proceedings prior to the

issuance of a final order, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *ABC Air Freight Co.* v. *CAB*, —— F. 2d ——, —— (2 Cir. 1969), slip opinions 183, 194-95. Nevertheless we believe two features of this case make it appropriate for us to direct conformity with our views on the preclusive effect of the FMC decision here and now. First, the reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect a successful party from being vexed with needlessly duplicitous proceedings. 2 Davis, Administrative Law Treatise § 18.12. (1958). If the latter interest is not protected at the outset of the second proceeding, it will be lost irreparably. Cf. *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80, 86-87 (2 Cir. 1961), *cert. denied*, 368 U.S. 986 (1962). In this respect, a claim of *res judicata* differs from a claim that an administrative agency has no jurisdiction over the subject matter of the investigation, as in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946); and *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947), an issue which Congress meant to be decided in the first instance by the agency itself.

SEC v. *Otis & Co.*, 338 U.S. 843, *rev'g* 176 F. 2d 34 (D.C. Cir. 1949), is not to the contrary. There the SEC, in the course of an investigation, had sought enforcement of a subpoena compelling an attorney to testify to conversations with a client, alleging that the evidence theretofore compiled amounted to a *prima facie* showing that the client had consulted the attorney for a fraudulent purpose. The district judge found the evidence insufficient and denied enforcement. Subsequently the Commission announced its intention to determine whether the client's securities firms should be suspended or expelled from mem-

bership in the National Association of Securities Dealers because of its participation in the alleged fraud. The firm and the client, alleging that the Commission had no new evidence of fraud, sought a declaratory judgment that the prior determination was *res judicata* on the existence *vel non* of substantial evidence of fraud, and an injunction against the inquiry. The district court dismissed the complaint, the court of appeals reversed, and the Supreme Court reversed on the petition for certiorari in a brief *per curiam* citing the *Myers*, *Macauley*, and *Arkansas Power & Light Co.* cases, *supra*.

This case is clearly distinguishable. In *Otis*, all parties appeared to agree, and we think correctly, that the SEC would not have been precluded by the prior determination if it had been able to come up with new evidence of fraud. Under the court of appeals holding, in order to avoid an injunction against the second proceeding, the SEC had to produce new evidence of fraud, the very matter which the proceeding was designed to discover. It would turn the administrative process on its head if, before the agency could make a determination, it had to convince a court that this would be supported by substantial evidence. Here, by contrast, the quantum of evidence to support or refute the FMC's determination is not relevant. The only issues are what that agency in fact determined and whether that determination is binding on the Maritime Administrator. The conclusions we have reached clearly follow from the face of the record and the relevant principles of statutory and administrative law.

There is a second feature justifying judicial intervention at this stage. While the proceeding before the Maritime Subsidy Board is not being held pursuant to a court order, such an order surely would have issued under 28 U.S.C. §1361 if the agency had not, by a timely compliance,

made it unnecessary. If such an order had issued, the court would have had discretionary power to modify or clarify it if such action appeared necessary because the agency misunderstood the nature of the proceeding required. Its power is no less because the agency willingly, if to some extent mistakenly, attempted to comply with the thrust of our prior decision before being ordered to do so.

We emphasize that the court's power to clarify the nature of the proceeding which the agency must undertake does not mean that exercise of that power is necessary, or even appropriate, in every dispute that may arise over the manner in which the proceeding is being conducted. In most situations, the reasons for the normal exhaustion requirement will prevail over anything to be gained by immediate intervention. Here, however, there is nothing to be gained and much to be lost by waiting for the agency to finish its deliberation without receiving proper instructions.

We therefore direct the district court to instruct the Maritime Administration not to redetermine the issue whether the AGAFBO carriers' concerted action in reducing their rates to an unreasonably low level and holding them there for eleven months was unjustly discriminatory or unfair to Sapphire.[2] With this modification, the order denying an injunction is affirmed. No costs.

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[2] Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-six day of February one thousand nine hundred and seventy.

Present:

HON: J. EDWARD LUMBARD,
Chief Judge,

HON: HENRY J. FRIENDLY,
HON: WILFRED FEINBERG,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed as modified without costs in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Memorandum by Judge Dooling Incorporating Findings of Fact and Order Denying Injunction

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 C 643

[SAME TITLE]

Appearances:

ISADORE B. HERWITZ, Esq. for plaintiffs

GILBERT S. FLEISCHER, Esq. (EDWARD R. NEAHER, Esq., United States Attorney, LOUIS E. GRECO, Esq., Attorney in Charge, Admiralty and Shipping Section, Department of Justice, of Counsel) for defendants

DOOLING, D. J.

Plaintiffs now move, essentially on the opinion of the Court of Appeals, the decision of the Federal Maritime Commission of December 12, 1967, in Docket No. 65-13, and the provisions of Section 810 of the Merchant Marine Act, 1936, 46 U. S. C. §1227, for an injunction restraining the defendants from making any further payment of operating or construction differential subsidies to the AGAFBO members which have violated Section 810. The essential argument is that the Court of Appeals has held that Section 810 is "mandatory where applicable," that the violation of Section 15 of the Shipping Act, 1916 (46 U. S. C. §814) has been established by the decision of December 12, 1967, and that in consequence subsidies must now be halted instanter under the command of Section 810. Plaintiffs contend that since Sapphire remains bankrupt and forced out of business although desirous of reentering

the trade, and the AGAFBO members allegedly continue in guilty enjoyment of the traffic their predatory rates disabled Sapphire from carrying, the AGAFBO members cannot be said to have effected that "return to the paths of virtue" which alone under the Court of Appeals opinion—plaintiffs argue—would excused their being mandatorily debarred form subsidies as "current violators." Plaintiffs argue that the Maritime Subsidy Board, Maritime Administration, flouted rather than gave effect to the decision of the Court of Appeals when it initiated by the Order of October 24, 1969, the proceeding to compile a record which will provide a basis for recommending to the Board whether Section 810 has been violated and the appropriate action that should be taken.

The Board has indeed formally initiated such a proceeding on notice to all parties in interest, and it has impliedly answered in the negative the inquiry made by the Court of Appeals: Did the Maritime Administration make a considered decision whether or not to recover the subsidies paid in the past. Again impliedly, it has now embarked on the task and means to make a considered decision and to make it on grounds consistent with the statute. See Slip Opinion, page 3511.

Plaintiffs' argument must be rejected and their motion for an injunction denied. The Court's resolution of the problem of statutory interpretation was to read the statute as mandating arrest of subsidy payments so long as Section 810 violation continued, and as according the injured competing carrier an interest in and standing to question the Administrator's failure to seek a recovery of subsidies so paid. The two parts of the Court's holding are perfectly congruent. The Court did not find that Section 810 had been violated, or that a finding of a violation of

Memorandum by Judge Dooling

Section 15 is a finding of a violation of Section 810, and it did not indicate a finding that the AGAFBO members were "current violators" of Section 810.

The current action of the Board cannot be regarded as improper. Expeditiously pursued, it might well meet every need of the present situation and every legally recognized interest of the plaintiffs. What further steps should be taken in the present action to assure diligent procedure by the Board and to determine the future shape of the present case should be made the subject of early applications by the parties.

It is

ORDERED that the motion for an injunction is in all respects denied.

Brooklyn, New York
December 9, 1969.

s/ JOHN F. DOOLING, J.
U. S. D. J.

Federal Maritime Commission Docket No. 65-13
December 12, 1967

Reported in 11 F.M.C. 263

RATES ON U.S. GOVERNMENT CARGOES

Rates which are admittedly noncompensatory and which are reduced in order to unfairly attempt to drive a competitor from the trade are contrary to section 18(b)(5).

Rates which are no longer effective and which were promulgated pursuant to an outdated system of rate negotiations are not amenable to section 18(b)(5).

A conference of carriers, by reducing its rates to an admittedly unreasonable and noncompensatory level in order to drive another carrier from a trade, violates section 15 and the terms of the conference agreement.

Failure of a carrier to abide by its tariff provisions is contrary to section 18(b)(1).

Under section 15, a dormant agreement may not remain approved but must be canceled or modified to reflect its present purpose.

Elmer C. Maddy and *John Williams* for respondent conference Atlantic & Gulf American-Flag Berth Operators and certain of its member lines.

Warner W. Gardner, Robert T. Bassiches, and *James B. Goodbody* for respondent conferences West Coast American-Flag Berth Operators and Trans-Pacific American-Flag Berth Operators and certain of their member lines.

George F. Galland, Robert N. Kharasch, Philip F. Hudock, and *J. K. Adams, Jr.* for respondents States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport, Inc., and Bloomfield Steamship Company.

Federal Maritime Commission Docket No. 65-13

Sterling F. Stoudenmire, Jr. for respondent Waterman Steamship Corporation.

William B. Ewers and *Ira L. Ewers* for respondent Moore-McCormack Lines, Inc.

Joseph A. Klausner and *Mitchell W. Rabbino* for respondent Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp.

Wilbur L. Morse and *Howard A. Levy* for Department of Defense; *Harry R. Van Cleve, Thomas J. O'Reilly,* and *Paul J. Fitzpatrick* for General Services Administration; *John A. McWilliam* for Toledo-Lucas County Port Authority; *Alan F. Wohlstetter* for Household Goods Forwarders Association of America, Inc.; *William L. Marbury* and *Philip G. Kraemer* for Maryland Port Authority; and *Chas. R. Seal* for Virginia State Ports Authority, interveners.

Donald J. Brunner, R. Stanley Harsh, and *Samuel B. Nemirow,* Hearing Counsel.

Report

By the Commission: (John Harllee, Chairman; George H. Hearn, Vice Chairman; Ashton C. Barrett, James V. Day, Commissioners)*

The Proceedings

On May 6, 1965, the Commission, on its own motion, instituted this investigation of virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf

* Commissioner James F. Fanseen did not participate.

American-Flag Berth Operators), TPAFBO (Trans-Pacific American-Flag Berth Operators), WCAFBO (West Coast American-Flag Berth Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transportation Service (MSTS) General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

The Respondents

AGAFBO [1] and WCAFBO [2] are conferences or associations of U.S. flag carriers, which have been approved

[1] FMC Agreement No. 8080-2, Atlantic and Gulf American-Flag Berth Operators (AGAFBO): Alcoa Steamship Company, Inc., American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., American Union Transport, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Farrell Lines Incorporated, Grace Line Inc., Great Lakes Bengal Lines, Inc., Isthmian Lines, Inc., Lykes Bros. Steamship Co., Inc., Matson Navigation Company, Moore-McCormack Lines, Inc., Pacific Seafarers, Inc., Prudential Steamship Corporation, States Marine Lines (joint service of States Marine Lines, Inc., and Global Bulk Transport, Inc.), T. J. Stevenson & Co., Inc. (Stevenson Lines), United States Lines Company, Waterman Steamship Corporation.

[2] FMC Agreement No. 8186, West Coast American-Flag Berth Operators (WCAFBO): American Export Isbrandtsen Lines, Inc., American Mail Line Ltd., American President Lines, Ltd., Isthmian Lines, Inc., Matson Navigation Company, Pacific Far East Line, Inc., States Marine Lines (joint service of States Marine Lines, Inc., and Global Bulk Transport, Inc.), States Steamship Company, Waterman Steamship Corporation.

under section 15 of the Shipping Act, 1916 (46 U.S.C. 814). Through AGAFBO and WCAFBO, carriers may discuss and agree upon rates, terms, conditions, and related services to be used as a basis for discussion and negotiation with various military shipper services for the transportation of military cargoes. TPAFBO[3] is an approved conference of U.S. flag carriers designed to permit carriers to discuss and agree upon rates, terms, and conditions, principally credit arrangements between the ocean carrier and the van line, for cargoes moving on through Government bills of lading (TGBL) under rate and service tenders approved by the Department of Defense (DOD).

Sapphire Steamship Lines, Inc. operates a liner service between United States North Atlantic ports and ports in the United Kingdom and the Bordeaux-Hamburg range.

Liberty-Pac International Corp., a New York corporation formed in 1960, is a forwarder of household goods on TGBLs between points in the United States and points throughout the world and is an approved tender holder for the transportation of such goods. Liberty-Pac ceased activity on November 11, 1966.

Pioneer Overseas Service Corporation, a New York corporation formed in 1963 and wholly owned by Marshall P. Safir, chairman of Sapphire, is a traffic management agency which performs many if not all of the services, for a fee, of household-goods movers. Pioneer does not represent tender holders at present.

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[3] FMC Agreement No. 8493, Trans-Pacific American-Flag Berth Operators (TPAFBO); same membership as WCAFBO, note 2 *supra*.

Federal Maritime Commission Docket No. 65-13

Facts

Movement of Defense Cargoes

The Cargo Preference Act of 1904, provides as follows:

> Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. (10 U.S.C. §2631)

On October 20, 1954, DOD and the Department of Commerce in the Wilson-Weeks Agreement agreed that the merchant shipping required by DOD, exclusive of the MSTS nucleus fleet and consistent with military requirements and prudent management, would be obtained in the following order: berth-line operators, time or voyage charters, vessels under general agency agreement with National Shipping Agency, and foreign-flag vessels.

After the termination of World War II, the Army and the Air Force secured ocean commercial transportation for their cargoes through Army Transporation Corps (ATC) contracts. The first contract was executed in October 1946. The rates and conditions for this transportation were the same for all lines in a given trade. The contracts were of a space-charter variety, and the rates were on a FAS basis.

The transportation of Navy cargoes during the same period was performed under Navy contracts, which were generally similar to those of ATC.

The procedure for obtaining ocean transportation for military cargoes was changed in 1950 when this responsibility was given to MSTS. Inasmuch as the stevedoring of cargo at military terminals was performed by the military, the contract rate was quoted FIO, to be adjusted where the cargo might move over commercial terminals. Since the space-contract system employed by ATC had proved unsatisfactory in that there was a tendency toward poor stowage, the MSTS contract was revised so that the payment of freight would be on the basis of the measurement of cargo on dock, with allowance for broken stowage. MSTS allocated cargo among the U. S. flag carriers based on the number of liner sailings, a system which generally was satisfactory to the lines. Under this system, an effort was made to provide a balanced load for each vessel.

In their discussions with MSTS, as with ATC previously, the lines presented their costs and other data in support of rates. The rates could be revised upon demand by either party for renegotiation, and failure to agree within 60 days automatically canceled the contract. Subsequently, in 1957, MSTS prescribed a formula for the submission of requests for increases. The formula required the submission of cost data limited to wages, subsistence, repairs and maintenance, stores, supplies, insurance, and fuel. In due time MSTS would announce its decision as to the rate. If the lines were dissatisfied with the decision, they could present their objections; sometimes MSTS would agree to changes. MSTS had the final say in these matters. When negotiations were concluded, the rates were filed with the Commission. Although

AGAFBO and WCAFBO acted collectively for their member lines during the negotiations, the contracts were executed by the individual lines. To areas not covered by shipping contracts, military cargoes moved on berth terms on Government bills of lading at commercial rates.

On April 4, 1966, the Deputy Assistant Secretary of Defense for Transportation and Logistics announced that DOD's practice of procuring ocean freight services would be altered so that procurement, to the maximum extent possible, would be obtained through price competition. The new policy was implemented by MSTS's Request for Proposals No. 100, issued on June 16, 1966.

Carriers of military household goods moving on TGBLs at through rates previously filed rate proposals with MTMTS,[3a] which coordinates the shipment of such goods. The ocean-rate segment, after having been negotiated by MSTS, was supplied to MTMTS, and was then transmitted by that agency to the carriers for inclusion in their tenders. The tenders were filed semi-annually for periods of six months. The tenders submitted were made available to other carriers. Prior to the effective date of the rates, carriers were allowed to meet the lowest rates, but they could not go below such rates. This was known as the "me too" system. After the rates became effective there were three me-too cycles available in a given six-months' period; new carriers could come in for the first time in these subsequent cycles and file competitive rates. MTMTS divided the available tonnage among the carriers having comparable rates.

[3a] Military Traffic Management and Terminal Service.

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Ocean Rates on Military Cargoes

The original ATC contracts provided for payment to the lines of 44½ cents per cubic foot of space reserved, whether used or not. However, when MSTS took over in 1950, after making allowances for the FIO factors, the rate arrived at was about 15 percent lower than the commercial rate on similar commodities. This envisaged a broken-stowage allowance of 20 percent. In 1951, the difference between the berth and FIO rates was set at 22.5 cents.

The contracts contained a schedule of rates for certain general descriptions of cargo (depending to some extent upon the trade); e.g. general, household goods, unboxed vehicles, unusual size, unboxed guns, refrigerated, explosives, hazardous, bulk, lumber, poles and piling, and empty Conex containers (inbound). The first five categories had three kinds of rates: basic, reduced A, and reduced B, the latter two being applicable to cargo when shipped in larger volume. The rates for on-desk cargo were 10 percent lower. In the trans-Pacific trade in fiscal year 1965, about 78 percent of the MSTS cargo moved at the basic rates and about 11 percent each at the reduced rates; the corresponding figures for the AGAFBO lines do not appear of record. Between 1950 and 1964, the WCAFBO lines received five rate increases totalling 44.3 percent. Rate increases granted to the AGAFBO lines in the same period approximated 30 percent; increased costs of operation do not appear of record. Comparing six principal commercial commodities moving via WCAFBO lines with comparable MSTS commodities moving in volume, for the years 1950-1965, the rates on the former increased an average of 66 percent as compared with 44 percent for the latter; the corresponding figures for the AGAFBO lines do not appear of record.

As illustrative of the rate picture just prior to the advent of Sapphire upon the scene, the AGAFBO rates, FIO per cubic foot, on five representative commodities from Atlantic and Gulf Ports to Ports in the Bordeaux-Hamburg range, were as follows:

	Basic	A	B
General cargo	54½	43½	38
Household goods	58½	47	41
Unboxed vehicles (up to 8960 pounds)	66½	53	46½
Unusual size	69	55	48½
Unboxed guns	87	69½	61

The rates of the WCAFBO lines, on the same commodities, were somewhat higher to basic Far East countries, and even higher to more distant trans-Pacific areas.

Sapphire's first tariff was issued on February 12, 1965, effective March 14, containing rates on "general cargo", and excepted MSTS cargoes and personal property of military personnel and Government employees. Effective March 14, the tariff was broadened slightly by adding specific rates on farm machinery and on household goods and personal effects NOS, the rate on the last-named being 81 cents per cubic foot. Effective March 31, Sapphire published a rate of $7 per net 100 pounds or 45½ cents per cubic foot on household goods shipped by any Government agency and moving on through Government bills of lading. The household-goods rates were effective for six months. Also effective March 31, Sapphire published an FIO rate of $16 a measurement ton (40 cents per cubic foot) on military cargo. There was no FIO rate for house-

hold goods shipped by MSTS, and any such goods would have moved at the 40-cent rate applicable to MSTS general cargo. Effective April 9, Sapphire extended the area coverage to Gulf ports. A westbound rate of 38 cents per cubic foot on POVs,[4] effective March 31, also was published, but just prior to the arrival in port of Sapphire's first vessel qualified to carry MSTS cargo from Europe, U. S. Lines filed a rate on POVs slightly lower than the Sapphire rates; Sapphire then filed a rate of 35 cents for foreign made POVs, effective April 19, which was lower than the rate of U. S. Lines, but retained the rate of 38 cents on other POVs.

Effective March 29, 1965, AGAFBO reduced its through-bill household goods rate from 81 cents (which it had negotiated with MSTS at the latter's request) to 45½ cents per cubic foot. The rate was quoted for a 30-day period unless further extended, and it eventually expired on March 1, 1966, and reverted to 81 cents. To maintain the 22½-cent stevedoring differential between its berth rate (45½ cents) and its FIO contract rate of 58½ cents, AGAFBO published an FIO rate of 23 cents per cubic foot on military household goods, effective March 29, for a period of 30 days, at which time it reverted to the 58½-cent level. By letter to MSTS of March 29, AGAFBO stated that it did not believe the reduced rates were fair, reasonable, or compensatory and that the reductions were made strictly as a temporary competitive action.

Waterman withdrew from AGAFBO on May 22, 1965, and immediately filed its own tariff containing negotiated military rates, generally comparable to those of AGAFBO. It also filed a tariff for military household goods moving under through Government bills of lading,

[4] Privately-owned vehicles.

naming a rate of 45½ cents per cubic foot. In addition, effective July 28, in its regular commercial tariff, Waterman published an FIO rate of 40 cents per cubic foot on MSTS general cargo NOS which would apply to household goods. Waterman rejoined AGAFBO in March 1966 and canceled these tariffs.

Operating Margin of AGAFBO-WCAFBO

AGAFBO and WCAFBO have made a comprehensive cost study of about $100,000,000 of steamship operations in the fourth quarter of 1964. The study shows that inbound cargoes were carried at a loss and this loss should be borne by outbound cargoes. Since MSTS accounted for 48% of all space used outbound, MSTS cargoes should bear 48% of all inbound losses. In the Atlantic Gulf United Kingdom trade, MSTS cargo produced revenue of $8,500,000, a profit of $580,000 before replacement allowances, subsidy, and income tax. There was an operating loss on all incoming cargo of $3,000,000. Allocating 48% of the loss to MSTS cargo ($1,440,000), MSTS cargo shows an overall loss of $860,000.

As to the U. S. Pacific Coast Far East trade, MSTS produced revenue of $11,000,000 and a profit of $1,575,000 before replacement allowance, subsidy, and income tax. There was an operating loss on all incoming cargoes of $955,000. Allocating 48% of this loss to MSTS cargo, the operating profit is reduced to $1,135,000.

World-wide in this period, MSTS outbound cargo via AGAFBO and WCAFBO carriers occupied about 66,000,000 cubic feet, producing revenue of about $26,000,000. The operating profit before replacement allowance, subsidy, and income tax was about $2,900,000 or .044 per cubic foot. There was an operating loss of about $6,-

300,000 on all inbound cargo, or .93 per cubic foot. Allocating 48 percent of the incoming loss to MSTS cargo, the operating loss on MSTS cargo would be about $3,000,000. Subtracting this amount from the outbound profit of $2,900,000, the operating loss would be about $100,000.[5]

Sapphire's Operating Margin

Sapphire's principal interest from the beginning was the carriage of military household goods, with a build-up of commercial cargo, and it planned a shuttle berth liner service with three vessels, with a turn-around of 35 days, between Baltimore and Antwerp. At this time, Sapphire felt it had in hand about 32,000,000 pounds of household goods for its ships. The outbound rate was not to be so high as to support the costs of the round voyage, and two-way movement was necessary, with the anticipated profit to come from the inbound household goods movement.

The three vessels originally chartered were C-2's, each with a bale cubic capacity of 540,000 to 550,000 feet. After applying a broken-stowage factor for a combination of household goods and military and commercial cargo, it was estimated that there would be about 800,000 cubic feet of usable space of a round voyage for each vessel; about 300,000 cubic feet was allocated for household goods, the balance to be available for MSTS general cargo, on an allocation basis, and commercial cargo. The preponderance of the household-goods movement is inbound and the volume of MSTS general cargo is predominantly outbound.

Since the over-all costs of a round voyage exclusive of some administrative salaries were estimated at about

[5] Another study based on measurement tons showed that MSTS was receiving from WCAFBO a discount of about 21 percent of the commercial rate before any adjustment for broken stowage.

$140,000, or about $4,000 a day, it was felt that a profit would be possible with a 40 percent utilization of space. Furthermore, with an ocean rate lower than the AGAFBO rate, it was anticipated that there would be a diversion of some cargo from New Orleans to Baltimore. About 65 percent of the household-goods movement at that time from the Atlantic and the Gulf used New Orleans because of its location and lower rates.

With a shipping contract and the receipt of cargo on an allocation basis, Sapphire believed that it would be entitled to 3.61 of the available traffic, or about 1,600 measurement tons, a sailing. Sapphire did not believe that AGAFBO would meet its rates since the value to be carried by Sapphire would be quite small compared to the loss of revenue to the AGAFBO lines if they carried the remainder at reduced rates. This same feeling was held by some of the members of AGAFBO in the early stages.

Then then-existing AGAFBO rate for the movement of military household goods from the United States to the Bordeaux-Hamburg range and the United Kingdom was 81¢ per cubic foot. However, Liberty-Pac had reduced the through rate, including the ocean freight, by $5 per net hundredweight. The reduction was to be absorbed by a reduction of the ocean freight increment from 81¢ per cubic foot to 45½ cents or the $7 per net hundredweight which Sapphire filed. It was anticipated that the difference in ocean freight would be so great that it would be feasible for the household goods carriers to divert much of their cargo to the port served by Sapphire, instead of using New Orleans, which traditionally handled 65% or more of the household goods traffic.

At the rate originally contemplated by Sapphire for household goods through Baltimore, it estimated a revenue

yield of about $160,000 a voyage. Under the rate eventually filed, the results would be about $5,000 less per voyage.

When it became rather apparent that the anticipated volume of household goods was not to be realized and that all such goods would be taken out of the allocation system, Sapphire had to seek other cargo. New plans were formulated and it was decided not to pursue the matter of a shipping contract. Since the rates finally decided upon were to be lower than the AGAFBO rates and for a longer period of time than the AGAFBO rates, there would be a concentration on through-bill household goods. Instead of infrequent voyages out of the Gulf, eight voyages during the peak season would be serviced by two other chartered vessels calling only at New Orleans and Bremerhaven. About 21,000,000 pounds (3,000,000 cubic feet) of household goods were expected through the Gulf. With a turnaround of 40 days and at a rate of 45¢ per cubic foot, the Gulf revenue for eight round voyages would be about $400,000.

Three of the vessels chartered to Sapphire were purchased by the company around the first of 1966, at a total cost of $1,650,000.

In the first five months of its operation, Sapphire carried only 7.4 percent of the through-bill household goods on the Atlantic-Gulf Bordeaux-Hamburg route.

For the 15 completed voyages just referred to, the net loss to Sapphire was about $545,000 or about $36,000 a voyage, the inbound leg bearing the greater burden.

Competition for Military Household Goods

In September 1964, Liberty-Pac brought to the attention of DOD a new mode of moving household goods, by packing them in permanent twenty-and-forty foot aluminum con-

tainers. Household goods had been moved, and still are being moved, in small plywood containers, which by their nature were disposable. The new containers, unlike the plywood boxes, could be deck stowed and were believed to be less costly for the shipping companies to handle. At the start, it was considered that three dollars per net hundredweight would be saved.

At the same time, Liberty-Pac approached certain American flag lines for a reduction in ocean freight for containers in the Bordeaux-Hamburg range, which was the area to be served initially by the new Liberty-Pac mode.

Liberty-Pac had made its proposal on the condition that it be permitted to charter its own ships, if necessary. In order to make this offer more effective, it was also requested that military household goods be removed from the allocation system when traveling under a through bill of lading.

The Liberty-Pac proposal would have given the van lines the right to negotiate individually for more advantageous freight rates from the ocean carriers. This would have completely overturned the traditional approach of negotiation with MSTS by AGAFBO on a group basis.

At the time of the original Liberty-Pac proposal to DOD, the AGAFBO carriers began to take action to protect their competitive position. As a result of an AGAFBO meeting of January 7, 1965, the AGAFBO secretary advised a President's committee of possible management level action with DOD, Maritime Administration, Federal Maritime Commission, Department of Commerce, and Congressional committees. When Liberty-Pac went forward with its plans, AGAFBO began to secure information on all phases of the new mode, including chartering attempts, agents,

vessel itineraries, shippers, commercial cargoes, and military cargoes.

For some period of time, a large number of major van lines operating as movers of household goods in U. S. foreign commerce were deeply in debt to member lines of AGAFBO. For instance, 80 van lines owed AGAFBO a total of $5,083,826.40 in September 1964 and a total of $4,243,504.51 in October 1964. As AGAFBO itself reckoned, they had become bankers for much of the household moving industry. The build-up of such outstanding debts resulted from a practice of extending credit contrary to the AGAFBO tariff rules then effect. Rules adopted December 20, 1963, provided that outbound freights were payable within 15 business days from date of arrival at vessel's port of discharge. The rules were amended on November 16, 1964, to provide for an additional 30 calendar days to make payment for shippers who furnished an indemnity bond of $100,000. There were provisions for shippers to be placed strictly on a cash basis in the event of delinquencies of payment.

There had been some limited AGAFBO action with respect to reducing the indebtedness of the van lines. On March 10, 1964, there was a meeting with the largest debtor van line concerning unpaid amounts. By mid-February 1965, AGAFBO had not, however, taken any strict measures to enforce its tariff rules as to payments nor to apply the sanctions provided by tariff against van lines delinquent in their payments.

On February 15, 1965, AGAFBO discussed at length the Liberty-Pac proposal and then passed the following motion:

> Since Liberty-Pac International has submitted a proposal to the Department of Defense for the carriage

> of all military household goods between the Atlantic Coast and the Bordeaux-Hamburg and United Kingdom ranges, which service will be exclusively available through the Sapphire Steamship Lines, Inc., for which service the Pioneer Overseas Corporation is the FMC filing agent, it was agreed that the new enterprise represented a highly speculative venture and since the participants were indebted to the member lines for a considerable sum of money, the Secretary should by wire notify them as the initial step in collecting delinquent accounts, that unless all amounts due member lines were paid within seven days from date of telegraphic notice, the Secretary should then immediately request MSTS to request . . . [MTMTS] to take agreed action to insure collection of such accounts or suspend the carrier's tender.

Following the meeting, AGAFBO telegraphed the Pioneer group that unless payment of delinquent charges was made within seven days, MSTS would be informed and would be requested to ask MTMTS to take appropriate steps either to insure prompt payment or to suspend the tenders of the lines. MSTS was so notified on March 2.

On March 5, 1965, MSTS passed on the complaint to MTMTS. On March 10, 1965, MTMTS refused to act. On February 15, 1965, at the same time that AGAFBO agreed to take strong action against the Pioneer Overseas Group to collect past debts, AGAFBO agreed that "On amounts delinquent subsequent to November 16, they [the Pioneer Overseas Group] were to be notified that they would be placed on a cash basis". It was further agreed that each member line would immediately issue instructions to make certain that all its offices strictly adhered to this cash basis requirement.

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On February 18, 1965, AGAFBO notified the Pioneer Overseas Group that van lines which were delinquent in payment of amounts owed since November 16 "will on February 24 be placed on a cash basis".

On April 5, 1965, AGAFBO amended its cash requirements rule in a manner suggested by certain unnamed van lines whereby those which paid debts owed AGAFBO for services prior to November 16, 1964, would be taken off the cash list "whether or not current delinquencies remain unpaid".

At an AGAFBO meeting of April 13, the carriers agreed that court action should be started against members of the Pioneer group. Such suits were filed.

On February 24, 1965, AGAFBO filed a petition with the Commission requesting an investigation of the legality of the Sapphire Liberty-Pac operation. The Commission did not act on the petition.

On March 31, the secretary of AGAFBO was instructed to explore with counsel the possibility of legal action to prevent the use of unreasonably low rates by Liberty-Pac. In fact, AGAFBO filed a petition with the Commission asking that Sapphire's tariff be rejected as illegal. No action was taken by the Commission.

On April 1, MSTS instructed its offices to book the maximum quantity of household goods with Sapphire. On the following day, AGAFBO requested MSTS to suspend Sapphire's bookings, referring to the Sapphire operation as "opportunist cut throat competition" and charging that the use of Sapphire was contrary to the Wilson-Weeks agreement and DOD's financial requirements. MSTS, as a result, suspended Sapphire for two days, but MSTS lifted the suspension upon concluding that Sapphire had shown

sufficient proof of financial stability and otherwise had met all MSTS requirements.

Thereafter, AGAFBO complained of the MSTS policy of preferring Sapphire because Sapphire's rates had longer effective dates. In addition, AGAFBO communicated and had meetings with various officials of DOD, MSTS, and MTMTS concerning the proposed operations of Liberty-Pac and Sapphire.

On March 29, AGAFBO as a direct reaction to the rates of Sapphire reduced its through bill household goods rate from 81¢ (which it had negotiated with MSTS) to 45½¢ per cubic foot. The rate was quoted for a 30-day period and eventually expired on March 1, 1966. AGAFBO altered its FIO rate in a corresponding manner. AGAFBO notified MSTS that the rates were made as a strictly temporary competitive measure and were not fair, reasonable, or compensatory. AGAFBO also filed competitive rates on other goods in reaction to Sapphire's competition.

Miscellaneous Facts

U. S. Lines had the capacity to carry refrigerated beef for the military. MSTS had used these facilities on berth terms under Government bills of lading, with loading at commercial piers in New York. After MSTS had booked some of this cargo with U. S. Lines in June 1965, the carrier canceled the booking, advising MSTS that at

> . . . present time in spite of rate equality on principal cargo categories MSTS is holding cargo for competitors with the avowed intent of filling such competitive vessels before considering those of United States Lines. Under circumstances feel unable to continue to perform long range special services to MSTS in this area while such discriminatory situation persists.

The same type of refrigerated facilities possessed by Moore-McCormack also had been used by MSTS. The carrier canceled a booking for refrigerated space in June 1965, advising that the sailing of the particular vessel had been withdrawn because of the limited commercial bookings and the pending maritime strike, plus the fact that MSTS was unable to give the carrier any general cargo, it being:

> . . . understood that very large scale MST dry cargo bookings were made with our competition [Sapphire] which did not offer conventional reefer space, * * * Withholding of a dry cargo booking to our ship, which would have enabled us to sail on 18 June as scheduled and meet your total requirements is difficult to understand. Respectfully recmd serious reconsideration of present MSTS booking policy.

In May 1965, MSTS booked with Sapphire household goods for loading at St. Nazaire, at a rate of 40 cents per cubic foot. Waterman had a vessel available at that place at the same time and reduced its rate to 31½ cents. The cargo was unbooked in favor of Waterman, but Sapphire immediately filed a rate one half cent below the Waterman rate, and was then given the cargo.

By letter to DOD of December 11, 1965, Liberty-Pac's attorney confirmed the oral commitment made by Liberty-Pac's representative the previous day, that Liberty-Pac would "move empty Conex boxes from Germany to the United States on its chartered vessels, as space and sailing schedules permit, without charge", if permitted to charter its own vessels. In its approval on December 29 of Liberty-Pac's new-mode proposal, DOD stated that "Any supplementary offer such as your client's offer of free transportation of empty Conex containers from Europe to the U. S. should be embodied in the tender". Liberty-Pac

carried no empty Conex boxes from Germany, and it had no specific provisions for this transportation in its tariff on file with the Commission.

In its letter of March 11, 1965, to various van lines, Sapphire stated that its tariff filed that day contained a rate of $7 per 100 pounds for through-bill military household goods, and that this rate was a direct saving to the van lines of approximately $1 per 100 pounds. The purpose of this saving was to induce the van lines to divert their shipments from New Orleans to Baltimore since the cost through the two ports would be equalized and transit time via Baltimore would be shorter than via New Orleans.

MSTS tendered 124 POVs to Sapphire at Philadelphia on May 22, 1965, for loading on one of its vessels. As this vessel did not have special gear for handling automobiles, the tender was revoked in favor of a vessel of an AGAFBO member which was available and did have such equipment. Sapphire thereupon agreed to pay the difference in loading costs (about $7.50 per vehicle), and this offer was accepted by MSTS; Sapphire was then billed for the costs. The Sapphire tariff provided at that time that where the cargo required special equipment not on the vessel or the handling of cargo involved other expenses, such equipment should be provided by MSTS, who should also pay the other expenses.

On a voyage in May 1965, one of the Sapphire vessels loaded 59 truck-tractors for MSTS. These averaged six tons each, with none weighing less than two tons. Sapphire did not submit to MSTS a bill for heavy-lift charges although its tariff provided that such charges were applicable where the packages or pieces were in excess of two tons.

AGAFBO's rate reductions and later upward revisions were not made after negotiation with MSTS, who did not

agree that the former rates should become effective when the temporary reductions expired.

Government civilian cargoes move under commercial tariff rates and not under special Government rates. The AGAFBO and TPAFBO berth rates on military household goods moving on through Government bills of lading are lower than the corresponding rates contained in the tariffs of the commercial conferences of which the AGAFBO and TPAFBO lines are members. This means that household goods shipped by civilian agencies of the Government are assessed rates higher than those paid for military household goods which may be shipped on the same vessel. Furthermore, the commercial conferences do not permit negotiation, by their American flag member lines, of rates on cargo or property shipped by civilian agencies of the Government.

The AGAFBO and WCAFPO agreements require the carriers to furnish data to the Military Sea Transportation Service and such related Shipper Services as to cargo transportation costs, space availability, sailing schedules, and related matters.

WCAFBO has submitted all cost data requested by MSTS, but MSTS has not been satisfied with the data submitted by AGAFBO and takes the position that the data has been informative but not conclusive as to the reasonableness of AGAFBO's rates.

AGAFBO carried on negotiations with MSTS in several areas served by only one U.S. flag operator.

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The Issues

When the Commission instituted this proceeding, it specifically announced the legal questions to be resolved, as follows:

1. Whether the conference agreements have operated in a manner which is unjustly discriminatory or unfair to the U.S. Government or to any of its shipping agencies or between carriers or has operated to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of the Shipping Act; and whether the agreements should be modified or canceled pursuant to the standards of section 15.

2. Whether the conferences or member lines have carried out an agreement before it has been filed and approved by the Commission in violation of section 15.

3. Whether the member lines have charged rates on nonmilitary household goods, which rates were not properly on file with the Commission, in violation of section 18(b)(3).

4. Whether any respondent has offered to a U.S. Government agency a rate which was not filed with the Commission as required by section 18(b)(1), and, if so, whether such unfiled rate is so unreasonably low as to be detrimental to the commerce of the United States in violation of section 18(b)(5).

5. Whether any respondent has charged rates which are unjustly discriminatory with respect to goods sponsored by the U.S. Government in violation of sections 16 First or 17.

6. Whether the rates on Government cargo filed by AGAFBO, Waterman, or Sapphire are so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b)(5).

7. Whether the member lines of AGAFBO have individually or together with other lines acted to exclude any other carrier from the carriage of Government cargo in violation of section 14 Second.

8. Whether any respondent member of AGAFBO has violated section 14 Third by retaliating against any shipper (U.S. Government) by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminatory or unfair methods, because such shipper (U.S. Government) has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

9. Whether there exist unfiled agreements, subject to section 15, regarding the transportation of Government cargo between Sapphire, Liberty-Pac International Corporation, or Pioneer Overseas Corp.

Discussion

In his initial decision, the examiner concluded generally that the question of rates had become moot, that the record disclosed no unfiled agreements or rates or other violations with the exception of a refusal of space to MSTS by U.S. Lines.[6] With respect to the organic agree-

[6] The examiner stated that certain acts of AGAFBO were not authorized by any section 15 agreement, but he made no such ultimate conclusion. He also stated that AGAFBO unlawfully discriminated in pressing claims against some van lines but not others, but again he did not include this in his ultimate conclusions.

ments of AGAFBO and WCAFBO, the examiner recommended that the agreements be permitted to remain in force until MSTS certifies that it no longer has business with the groups, and at that time the agreements will be canceled or amended to show their present application.

The parties have excepted to numerous findings and conclusions of the examiner. Rather than consider the exceptions seriatim, we will attempt to group them into the following general categories: reasonableness of rates; actions taken against Sapphire; unfiled agreements, unfiled rates, or other violations; and continued approval of the agreements.

Reasonableness of Rates.

Our findings as to the operating margin of AGAFBO-WCAFBO carriers are based upon a comprehensive study prepared by the member lines of the costs of carrying military cargo. The examiner, while admitting that the studies were not as accurate or complete as possible, found that the AGAFBO and WCAFBO rates pass muster under the Shipping Act. However, the examiner found that when AGAFBO reduced its rates to deprive Sapphire of cargo, AGAFBO's rates became so low as to be detrimental to commerce contrary to section 18(b)(5).[7] The examiner, although noting Sapphire losses, found this carrier entitled to a reasonable trial period to stabilize its rates. In spite of these findings, the examiner concluded that the rate issues were moot.

[7] Section 18(b)(5) (46 U.S.C. §817(b)) provides:

> (5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Hearing Counsel and DOD challenge the examiner's consideration of the reasonableness of rates at all; they aver simply that the cost data, although not rebutted at the hearing, are unreliable. Both Hearing Counsel and DOD also submit that the entire issue is moot.

In response AGAFBO and WCAFBO assert that the studies were properly introduced with a host of supporting witnesses to attest to the methodology and comparative accuracy; since adverse parties could not impugn the validity of the studies, they must stand.

Granted that the studies are not as accurate or complete as might be, there is no justifiable reason not to accept them as a fair and honest attempt by the lines to come up with a meaningful story. The studies represent a reasonably close approximation of costs. *Increased Rates on Sugar*, 1962, 7 F.M.C. 404 (1962); *Alcoa Steamship Co., Inc.—General Increase in Rates*, 9 F.M.C. 220 (1966); *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180 (1965). Therefore, we agree with the examiner that there has been no showing on this record that the rates in effect prior to the competitive reductions were so unreasonably high as to be detrimental to the commerce of the United States, within the meaning of section 18(b)(5) of the Act.

We consider now the AGAFBO reduced rates which became effective March 29, 1965. As previously seen, MSTS was informed by AGAFBO that the reductions were temporary and for competitive purposes only, and that they were not believed to be fair, reasonable, or compensatory. There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military

cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b)(5) of the Act.

In the final analysis, the issue of whether the AGAFBO and WCAFBO rates met the standards of section 18(b)(5) is moot. Section 18(b)(5) permits the Commission to disapprove rates upon certain findings. Since the rates in question are no longer effective, they are no longer amenable to section 18(b)(5).

There has been no showing on this record that the rates of Waterman, during its nonmembership in AGAFBO, were so unreasonably high or low as to be contrary to section 18(b)(5) of the Act.

With respect to Sapphire's rates, the examiner, although noting losses on the first 15 voyages, held that Sapphire, being a new operator with attendant vicissitudes as evidenced by this record, was entitled to a fair chance to demonstrate whether it can operate in a sound financial manner.

AGAFBO argues that the examiner is logically inconsistent in finding that AGAFBO's rates were so low or unreasonably low as to be detrimental to the commerce of the United States contrary to section 18(b)(5) and yet exonerating Sapphire's identical rates. This, says AGAFBO, is illogical, particularly where Sapphire's losses at these rates were enormious and their expectations of cargo were naively optimistic.

The Commission has not found that Sapphire's rates were contrary to section 18(b)(5).

Actions Taken Against Sapphire

The examiner found that when AGAFBO learned of the Liberty-Pac proposal, AGAFBO generally acted with justification to protect itself; however, when AGAFBO pressed claims against some but not all van lines, AGAFBO violated sections 14 Third and 16 First. Likewise, the examiner found that AGAFBO's communication with various government agencies in an effort to impede Liberty-Pac/Sapphire was not authorized by its section 15 organic agreement and was, therefore, improper.

Hearing Counsel argue that the principal error and the cause of greatest regulatory concern in the initial decision is the failure to find that the joint acts of AGAFBO to eliminate Sapphire were unauthorized by the approved agreement and in violation of section 15. Sapphire, too, argues that the AGAFBO agreement does not include the right to attack a competitor collectively.

The premise of the contentions of Hearing Counsel and Sapphire are that joint actions taken by carriers to control or regulate competition must be authorized by section 15. Thus, Hearing Counsel argue that the examiner failed to recognize that the many actions taken by AGAFBO and its members to eliminate Sapphire from competition were evidence of a larger conspiracy which was in violation of section 15.

AGAFBO excepts to the examiner's decision to the extent of the finding that it acted unlawfully by pressing legal claims against some of the van lines. AGAFBO contends that it was justified in bringing suit on long over-

due claims. AGAFBO argues that the lawsuits were based on valid claims and that facts do not show that the van lines were singled out for any reason other than their poor credit standing.

AGAFBO also contends that it was authorized by its agreement to meet with officials of DOD and MTMTS. In fact, there had been a long history of such discussions. Furthermore, petitioning a government agency should not be considered to be illegal under any circumstances. Finally, AGAFBO argues that its unilateral rate action was not beyond the terms of the agreement because it was logical for the AGAFBO lines to assume they had the freedom to meet competition. This worked to the benefit of MSTS. Accordingly, AGAFBO argues that its agreement should not be so narrowly interpreted, particularly in view of the past relationship between AGAFBO and DOD.

Although the secretary of AGAFBO, pursuant to instruction, advised the association's President's Committee of the developing facts for possible management level action with DOD, Maritime Administration, Federal Maritime Commission, Department of Commerce, and congressional and Senate committees; there is no proof that the committee took any positive action. There are other references in the record of meetings between AGAFBO and DOD, MSTS, and or MTMTS concerning the new proposal, but it does not appear whether any of these were beyond the pale, unless it can be said that meetings with any Government agency other than MSTS were not within the scope or contemplation of AGAFBO's agreement. The agreement provides:

> 1.(a) They may meet from time to time and discuss cargo transportation costs, space availability,

> sailing schedules, and related matters, and agree as to rates, terms, and conditions of transportation and related services for such cargo, and as to matters relating thereto, which are to be used as a basis for discussion with Military Sea Transportation Service and said related "Shipper Services" for the purpose of negotiating rates, terms, and conditions for the transportation and related services for such cargo in common carriage; they may also negotiate as a body or through committees or selected representative or representatives, rates, terms, and conditions which shall become binding terms, and conditions which shall become binding on all parties hereto.

We find that this language authorized AGAFBO to meet with various DOD officials.

The petitions by AGAFBO requesting the Commission (1) to investigate possible unfiled rates by Sapphire, Liberty-Pac, or a related company, and whether they were unreasonably low, and (2) to reject Sapphire's first tariff because it did not conform to the statute and was the carrying out of an unfiled agreement with Liberty-Pac were also justified. Whereas it is true that the first petition was based on surmises and assumptions, and the association secretary testified that the beliefs turned out to be unfounded, the whole situation at that time was in such a state of turmoil that AGAFBO should not be penalized for filing the petition; good faith does not depend upon eventual results or hindsight. In the case of the petition to reject the tariff, moreover, it has been seen that Sapphire did amend the tariff to remove the objectionable features. Therefore, the filing of the petitions was not unlawful.

The Commission has not found that AGAFBO violated section 15 in requesting MSTS to suspend Sapphire or in

complaining that MSTS preferred Sapphire; that AGAFBO, by a series of action, conspired to drive Sapphire from the trade in violation of section 15; or that AGAFBO violated sections 14 Third and 16 First with respect to the collection of delinquent freight charges.

We consider now AGAFBO's ratemaking activities in reaction to Sapphire. AGAFBO reduced its rates to admittedly unreasonable levels with the sole purpose of mitigating any advantage to Sapphire. These rates were used as a predatory device to destroy competition and, as found above, were so unreasonably low as to be detrimental to the commerce of the United States contrary to section 18(b)(5).

Section 15 allows carriers to band together for the purposes of joint ratemaking in order to avoid the chaos which would result from wide-open competition. However, a conference is not permitted to engage in activity which is incompatible with the regulatory purposes of the Act. *States Marine Lines, Inc. v. Trans-Pacific Freight Conference*, 7 F.M.C. 204, 210, 215 (1962); aff'd. *sub nom. Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n.*, 314 F. 2d 928 (9th Cir. 1963). Furthermore, a conference, no matter what authority its organic agreement may contain, is not authorized to violate other provisions of the Shipping Act nor the general standards of section 15. *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 346-47 (1940).

With respect to rates set by a conference, the Commission has from time to time stated that it may disapprove or modify a conference agreement where a conference rate is so unreasonably high or low as to be detrimental to the commerce of the United States. *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 192-93 (1965). See also:

Edmond Weil v. Italian Line "Italia", 1 U.S.S.B.B. 395, 398 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1939); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940). In *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441 (1966), the Commission said:

> Thus, section 15 does not limit the Commission to the formal terms of an organic conference to the exclusion of the viable implementations—joint rates—of approved agreements. Consequently, if circumstances warrant, the Commission can act against rates on boiler parts under section 15.* Such action could be based upon a finding that a section 15 agreement operated in a manner contrary to the public interest or upon one of the other prohibitions of section 15.

Thus, we will consider whether the rate reductions offended the provisions of section 15. AGAFBO itself characterized its reduced rates as unreasonably low. The operating data submitted by AGAFBO show that this admission was accurate. The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by its means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its ratemaking functions, operated in a manner

* Respondents contend that the Commission may scrutinize ratemaking activities only under sections 17 and 18(b)(5). These provisions permit limited rate regulation of ocean carriers, both independent lines and conferences. Section 15, however, has a different role; its impact is against collective action, including ratemaking. 9 F.M.C. at 453-54.

which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire.[8] AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. *Isbrandtsen Co., Inc. v. United States*, 211 F. 2d 51 (D. C. Cir. 1954) cert. denied, 347 U.S. 990 (1954).[9] We therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.

AGAFBO argues that its rate reductions were authorized by Agreement No. 8086-2. While we agree with the examiner that the rate reductions filed *ex parte* were contrary to the authorization of the agreement to *negotiate* rates with MSTS, we consider the crux of the issue to be that the rates were reduced to a level which was admittedly unreasonable and which was detrimental to commerce and contrary to the public interest. Therefore, while the agreement does not contemplate *ex parte* reductions, it certainly does not sanction rate reductions which were admittedly and knowingly contrary to section 18(b)(5) and which violated the standards of section 15 as well.

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[8] Cf. *Investigation of Rates in the Kong Kong—United States Atlantic and Gulf Trade*, F.M.C. Docket No. 1085 (November 3, 1967) at 10.

[9] See also: *Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 289-90 (1966); *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962).

Other Violations

The examiner found no violations with regard to Sapphire's difficulty in obtaining and retaining overseas agents. We agree. The record shows only that the heat of the competitive struggle between AGAFBO and Sapphire was reflected in the acts of individual carriers and their agents.

The examiner stated that U.S. Lines in unbooking MSTS refrigerated cargo because of its dissatisfaction with MSTS's policy of distributing the carriage of general cargo, violated section 14 Third of the Act. AGAFBO argues that U.S. Lines did not retaliate; it canceled the sailing because of insufficient bookings. However, reference to the telegram in which U.S. Lines canceled the booking convinces us otherwise. It was clearly an unlawful retaliation against a shipper for patronizing a competitor. We sustain the examiner. It is immaterial that U.S. Lines was not in accord with the MSTS policy on general cargo.

Moore-McCormack is in a different position. Its particular vessel had limited commercial bookings, a maritime strike was pending, and MSTS did not provide general cargo in addition to the refrigerated cargo, hence cancellation of the sailing was necessary. The only way the sailing could have been made was to secure sufficient MSTS cargo, which would have made the sailing not subject to the strike. The fact that the carrier chose that time to remonstrate with MSTS on the latter's policy for the use of competitive vessels for general cargo is beside the point; it was not the retaliation proscribed by section 14 Third.

Sapphire contends that the calling of the Waterman vessel at St. Nazaire in an attempt to take household goods away from Sapphire when they already had been booked by MSTS, was a violation of section 14 Second of the Act (46 U.S.C. 812) which makes it unlawful for a carrier

to use a fighting ship for the purpose of excluding, preventing, or reducing competition by driving another carrier out of a trade. Waterman customarily served the various ports in the Bordeaux-Hamburg range, even though all ports were not served on every voyage. The act of putting the particular ship into St. Nazaire to load at rates below those of Sapphire was nothing more than run-of-the-mill competition for a parcel of cargo. There is no proof that the Waterman action was for the purpose of "driving another carrier out of a trade".[10]

The examiner found no unfiled section 15 agreement between Sapphire and Liberty-Pac or other van lines, AGAFBO excepted. We agree with the examiner that something more than a mere inference is needed to find such an agreement.

Sapphire's rates were available to all shippers alike, not just to Liberty-Pac. Mr. Safir testified that there were no agreements between Sapphire and the van lines—"just expressions of support, yes. Nothing else". His affidavit in reply to AGAFBO's petition for rejection of Sapphire's first tariff (referred to above) is to the same effect. As indicative of the absence of agreements, and as already seen, six of Pioneer's accounts left and other van lines which had promised support to the new operation did not give it.

Since the record shows only an association between Sapphire and its customers, we will not overrule the examiner. There is simply not enough evidence of an agreement contemplated by section 15.

AGAFBO charges that the offer of Liberty-Pac to DOD to carry empty Conex boxes without charge was in viola-

[10] See *Grace Line, Inc. v. Skips A/S Viking Line, et al.*, 7 F.M.C. 432 (1962).

tion of sections 16 First and 17. The examiner, stating that our decision in *Carriage of Military Cargo*, Docket No. 66-42 (August 9, 1966) aff'd. *sub nom. American Export Isbrandtsen Lines v. Federal Mar. Com'n*, 380 F. 2d 609 (D. C. Cir. 1967), made those sections inapplicable to the transportation of military cargo, refused to find such a violation. The examiner's reading of the case is in error; we found only that carriers could grant the government reduced rates, not available to private shippers, without violating the Shipping Act. This does not render the Shipping Act inapplicable to government cargo. Nevertheless, we agree with the examiner's conclusion. The offer was part of early negotiations between Sapphire and DOD. The final conditions of this offer were never formulated and we view the matter as tentative and incomplete.[11]

The examiner ruled that AGAFBO's allegation that Sapphire violated section 16 First by the absorption of railroad charges was beyond the order of investigation. While we believe the matter to be an issue, the record will not support a finding that Sapphire diverted cargo unlawfully from one port to another. The cargo attracted by Sapphire came by virtue of its low rates, not by any absorption.

AGAFBO has also alleged that Sapphire violated the Act by failing to abide by its tariff with respect to POV loading costs and heavy lift charges. The examiner found that section 18(b)(3), which prohibits a carrier from deviating from its tariff, was not in issue as to Sapphire. However, the record discloses that in these instances Sapphire did not follow the terms of its tariff. Accordingly, we find that Sapphire violated section 18(b)(1) by failure to file appropriate provisions in its tariff.[12]

[11] Neither was the proposal violative of section 18(b)(1) since it was not necessary to file such a tentative proposal.

[12] In view of this finding, we do not here consider whether this conduct also was contrary to the provisions of section 18(b)(3).

Hearing Counsel contend that AGAFBO was not authorized by the conference agreement to negotiate on behalf of a single member. A literal reading of the agreement shows to the contrary.

With respect to the submission of data by the conferences to MSTS, we find that the carriers complied with the established format in submitting cost information and complied with their agreement in this respect.

The Continued Approval of the Agreements

The examiner found that the predominant function of AGAFBO and WCAFBO terminated upon the commencement of the competitive bidding system of DOD. Rather than ruling that the agreements should be canceled outright, the examiner allowed the agreements to remain in effect pending the conclusion of outstanding business between the carrier groups and the government at which time the agreements would be canceled unless modified to reflect their new role.

Hearing Counsel assert that the agreements should be canceled immediately because of proof that the government has no further need for them. Hearing Counsel would allow no amendment. DOD contends that since it no longer desires to deal with the carrier groups, the groups should be found to be detrimental to commerce and contrary to the public interest and therefore disapproved. AGAFBO and WCAFBO agrue that these agreements may be canceled only upon a finding that they are contrary to section 15. The changed attitude of DOD alone does not authorize disapproval. Likewise, the conferences argue that DOD may well have a future need for the carrier groups.

It is the policy of the Commission to withdraw the approval of conference agreements where the agreement

has become dormant. This policy depends upon the wording of section 15 itself. Both initial and continued approval of an agreement are dependent upon a termination that the agreement is not contrary to section 15. *Agreement 8765—Order to Show Cause*, 9 F.M.C. 333 (1966). "Thus, one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by the agreement which warrant approval." 9 F.M.C. at 335-36.[13]

Where there is no need for or justification for a section 15 agreement the Commission feels that such an agreement remaining on the books to await some future event which was not contemplated by the original approval of the agreement tends to handicap the Commission's responsibility to see that section 15 agreements operate in a manner consistent with the law. The Commission feels that it is far better to cancel inoperative agreements than to await a future need for an agreement so that that need may be measured against the requirements of section 15. We will follow that policy here.

The agreements under investigation have as their very core the negotiation of rates with MSTS. This fundamental activity cannot be implemented at present. Therefore, we direct that the agreements must be modified to delete authorization to negotiate rates with MSTS. The remainder of the activities contemplated by the agreements have not been completely made obsolete by the competitive bidding system. Therefore, we will allow the continued approval of these activities. In order to bring the agreements in line with the present functions of the carrier

[13] In *Cuban Agreements*, Docket No. 66-14 (August 17, 1966), the Commission allowed dormant agreements to remain approved because their dormancy was the result of governmental embargo.

groups, we will order that the groups submit within 120 days, appropriate modifications which delete the dormant activities and show the present applicability of the agreements.

The TPAFBO agreement may remain in full force and effect as previously approved.

Ultimate Conclusions

1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to section 18(b)(5).

2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).

3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

4. AGAFBO did not otherwise violate the Shipping Act.

5. U.S. Lines, by canceling a booking because MSTS patronized Sapphire, retaliated against MSTS in violation of section 14 Third. Moore-McCormack, however, simply remonstrated with MSTS about its policy and did not violate section 14 Third.

6. Waterman did not use a fighting ship in violation of section 14 Second.

7. Sapphire, Liberty-Pac, or other van lines did not enter into or carry out an unfiled agreement subject to section 15.

8. Sapphire did not violate sections 16 First or 17 by offering to carry empty Conex without charge since the offer was part of early negotiations and never consummated.

9. Sapphire did not violate section 16 First by directing cargo from one port to another.

10. Sapphire violated section 18(b)(1) by failing to file appropriate tariff provisions regarding POV loading costs and heavy lift charges.

11. The agreements of AGAFBO and WCAFBO must be amended to delete authorization concerning dormant functions such as authority to negotiate rates with MSTS and these carrier groups must submit appropriate modifications within 120 days hereof to delete dormant activities and to show the present application of the agreements.

12. The TPAFBO agreement may remain approved.

Chairman Harllee and Commissioner Barrett, Separate Opinion

We wish to state for the record the following views in which we differ from those set forth above.

The Commission has absolved AGAFBO in the President's Committee episode, condoned the filing of petitions

with the Commission, refused to condemn the right of AGAFBO to talk to DOD officials, and denounced AGAFBO's reduced rates. We agree.

However, we are convinced that AGAFBO violated section 15 by conspiring to destroy the competition of Sapphire. In our opinion, our fellow Commissioners, in ignoring the motives behind the AGAFBO intrigue, have failed to recognize that cumulatively all these acts, many with a gloss of legitimacy, were the effectuation of one agreement—to crush Sapphire.

At the time of the original Liberty-Pac proposal, the AGAFBO carriers began an exhaustive campaign to preserve their monopoly position. The first manifestation of this conspiracy was the advice from the AGAFBO secretary to a president's committee regarding the Liberty-Pac proposal for possible action with Government agencies. Thereafter, AGAFBO began to secure information on all phases of the new mode, including chartering attempts, agents, vessel itineraries, shippers, and potential cargoes.

Following a series of half-hearted attempts to collect back freight charges from all van lines, AGAFBO commenced a series of retaliatory acts against the Pioneer group. These van lines were singled out and informed that unless they paid up in full AGAFBO would request MSTS to ask MTMTS to insure prompt payment or to suspend the tender of the van lines for lack of financial responsibility. AGAFBO followed through on this threat. Subsequently, AGAFBO rewarded those van lines that had left Pioneer under this pressure with renewed credit standing. Finally, the AGAFBO members brought suit against the remaining members of the Pioneer group, al-

though other van lines still owed the AGAFBO carriers for back freight charges.

Also, in furtherance of the concerted campaign to defeat the new competition, AGAFBO filed several petitions with the Commission designed to handicap the Sapphire operation.

As Sapphire began to make progress in its new venture, AGAFBO sought to have MSTS suspend Sapphire from carrying Government cargo. AGAFBO requested MSTS to suspend Sapphire's bookings of through-bill household goods because of its "cut-throat competition and insufficient financial stability", plus the charge that the use of Sapphire by MSTS was contrary to the Wilson-Weeks agreement. AGAFBO also complained to MSTS that the latter was preferring carriers which filed rates which had longer effective dates. The record also reflects AGAFBO communications and meetings with various officials of DOD and MTMTS—in addition to MSTS—in an effort to block and impede the proposed operations of Liberty-Pac Sapphire. Finally, AGAFBO used its ultimate weapon, cutting rates to rock bottom.

The various AGAFBO activities lead to but one conclusion, that the carriers agreed to take whatever steps were necessary to drive Sapphire from the trade.[14] The cumulative effect of all of these acts was decidedly one to destroy competition; that is, to end the threat of Sapphire and preserve the monopoly of AGAFBO. This concerted undertaking amounted to a new scheme or rate combination and discrimination not embodied in the

[14] We drew a similar inference in *Orange Line v. Anchor Line Ltd.*, 6 F.M.B. 199, 208 (1961).

AGAFBO agreement. Thus, there was no section 15 authorization for such conduct.[15]

It would appear that our fellow Commissioners were impressed by the fact that for the most part AGAFBO utilized legal means to combat Sapphire. However, the legality of the means is immaterial. Under the antitrust laws, the courts have frequently followed a general rule enunciated in *American Tobacco* v. *United States*, 328 U. S. 781 (1946) that:

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibitions. 328 U. S. at 809.

We fail to see why the rule should not apply here.[16]

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[15] *N. Atlantic Mediterranean Frt. Conf. and United Arab Co.*, 9 F.M.C. 431, 434 (1966); *Isbrandtsen Co., Inc. v. United States*, *supra*; *Empire State Highway Transp. Ass'n. v. F.M.C.*, 291 F. 2d 336 (D.C. Cir. 1961); *Swift & Co. v. Gulf and South Atl. Havana Conf.*, 6 F.M.B. 215 (1961), aff'd. *sub nom. Swift & Company v. Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962).

[16] *Eastern R. Conference v. Noerr Motors*, 365 U. S. 127 (1961), which guarantees the right freely to engage in political activity, and *Mine Workers v. Pennington*, 381 U. S. 657 (1967), which preserves the right to petition the government to take valid governmental action, are exceptions to the rule of *American Tobacco*. Neither *Noerr* nor *Pennington* sanction a pervasive scheme by a group wielding its power in every direction to destroy a single competitor.

With regard to pressure that AGAFBO brought to bear against the van line customers of Pioneer for nonpayment of ocean freight, we would find that AGAFBO retaliated against unfaithful shippers in violation of section 14 Third. We also would hold that the pressing of the claims and the instituting of legal proceedings subjected the victims to undue and unreasonable prejudice and disadvantage in violation of section 16 First.

Finally, we believe the examiner correctly decided that Sapphire's rates were not contrary to section 18(b)(5). The record reflects the method by which Sapphire established its rates. We would find that Sapphire did not develop these rates capriciously but promulgated its tariff after a careful analysis of the anticipated cost of operation and consideration of the cargo that might reasonably be expected to be booked on Sapphire's ships. Thus, Sapphire's rates which originally might have proved to be compensatory turned out to be seriously below the cost of operation, principally because AGAFBO deprived it of the nucleus cargo which was indispensable to Sapphire's profitable operation.

THOMAS LISI
Secretary

(Seal)

Order of Maritime Subsidy Board Under Docket No. S-243

MARITIME SUBSIDY BOARD
MARITIME ADMINISTRATION
DEPARTMENT OF COMMERCE

Docket No. S-243

INVESTIGATION INTO ALLEGED VIOLATION OF SECTION 810, MERCHANT MARINE ACT, 1936, AS AMENDED

ORDER

On December 12, 1967, the Federal Maritime Commission rendered a decision in its Docket No. 65-13, styled Rates on U. S. Government Cargoes. Therein the Atlantic and Gulf American Flag Berth Operators were found to have violated Sections 18(b)(5) and 15, Shipping Act, 1916, as amended (46 U.S.C. 817 and 814).

By letter to the Maritime Subsidy Board, Maritime Administration, dated December 19, 1967, and subsequent correspondence, Sapphire Steamship Lines, Inc., Pioneer Overseas Services Corporation, Liberty-Pac International Corporation, Marshall P. Safir, individually, and Arnold Weissberger, individually, through counsel, invoked Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. 1227) and demanded that the Maritime Subsidy Board "1. Forthwith cease and desist from making payments and subsidies of any kind to any contractor and 2. Move to recover all operating-differential and construction-differential payments and subsidies made from March 29, 1965 to date to any such contractors."

Order of Maritime Subsidy Board Under Docket No. S-243

By summons dated June 24, 1968, a civil action was initiated by Sapphire Steamship Lines, Inc., Marshall P. Safir and Arnold Weissberger naming as defendants James W. Gulick, Acting Maritime Administrator, Maritime Administration, United States Department of Commerce, James S. Dawson, Jr., Secretary, Maritime Subsidy Board, Maritime Administration, United States Department of Commerce, and C. R. Smith, Secretary of Commerce of the United States. Subsequently, Andrew Gibson was successor to and substituted for James W. Gulick and Maurice Stans was successor to and substituted for C. R. Smith. The plaintiffs sought to compel defendants to cease paying operating-differential subsidies to certain members of the Atlantic and Gulf American Flag Berth Operators and to sue said members to recover subsidy theretofore paid.

By memorandum and order dated February 20, 1969, the United States District Court for the Eastern District of New York dismissed the complaint.

Notice of appeal was filed by plaintiffs on March 7, 1969, oral argument was heard by the United States Court of Appeals for the Second Circuit on June 2, 1969, and a decision was rendered on September 26, 1969. The appellate court reversed the lower court order and remanded for further proceedings consistent with its opinion.

Now that the United States Court of Appeals for the Second Circuit has rendered its opinion, and in order not to further delay processing of its consideration of the matter, the Maritime Subsidy Board will develop a record for the purpose of making a considered administrative decision on the questions posed.

THEREFORE, IT IS ORDERED that the Chief Hearing Examiner (or his designee) act as the Representative of the

Board and conduct an investigation pursuant to Section 214, Merchant Marine Act, 1936, as amended (46 U.S.C. 1124), in accordance with the Board Administration "Rules of Practice and Procedure" published on October 22, 1964 (29 F.R. 14475), and *compile a public record which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810, Merchant Marine Act, 1936, as amended (46 U.S.C. 1227), has been violated and the appropriate action that should be taken.*

IT IS FURTHER ORDERED that the following steamship operators, which were both members of the Atlantic and Gulf American Flag Berth Operators and contractors with the Maritime Subsidy Board under Title VI, Merchant Marine Act, 1936, as amended, during the period March 29, 1965 to March 1, 1966, be named as parties to this proceeding: American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Farrell Lines Incorporated, Grace Line Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Incorporated, Prudential Lines, Inc., and United States Lines, Inc.

IT IS FURTHER ORDERED that the following steamship operator, which was a member of the Atlantic and Gulf American Flag Berth Operators and which formerly was party to a contract under Title VI of the Merchant Marine Act, 1936, as amended, until December 31, 1965, be named as party to this proceeding: Bloomfield Steamship Company.

IT IS FURTHER ORDERED that Sapphire Steamship Lines, Inc., Marshall P. Safir, Arnold Weissberger, plaintiffs in the aforementioned litigation, be named as parties to this

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* Emphasis supplied.

proceeding and that Pioneer Overseas Services Corporation and Liberty-Pac International Corporation, which joined with the plaintiffs in the original correspondence to the Maritime Subsidy Board, Maritime Administration, on December 19, 1967, directly and individually be served with a copy of this order, and, thereby, be extended the opportunity to file petition for leave to intervene in this proceeding.

IT IS FURTHER ORDERED that a copy of this order be served upon each party and person named hereinabove.

So Ordered by the
Maritime Subsidy Board/
Maritime Administrator

Date: October 24, 1969

JOHN M. O'CONNELL
Assistant Secretary

Opinion of United States Court of Appeals, Second Circuit, September 26, 1969

Reported in 417 F (2), 972

FRIENDLY, *Circuit Judge*:

The plaintiffs in this action are Sapphire Steamship Lines, Inc., and two of its officers and stockholders. In March, 1965, Sapphire began operations as an unsubsidized common carrier by water, undercutting the rates of various carriers which were members of a conference known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO). Shortly thereafter, on March 29, 1965, AGAFBO drastically reduced its rates to an admittedly unfair, unreasonable and noncompensatory level. As a result of this reduction, Sapphire was deprived of cargo which was indispensable to its profitable operation. Some eleven months later, on March 1, 1966, AGAFBO raised its rates to their former levels. Sapphire went out of business in March of the following year and was adjudged a bankrupt that May.

On December 12, 1967, the Federal Maritime Commission issued a report, Docket No. 65-13, on the result of an investigation "of virtually the entire spectrum of the U.S. military cargoes," in which AGAFBO was a respondent. The Commission concluded that "the drastic reductions [in AGAFBO's rates] were designed for but one purpose, the elimination of Sapphire from the carriage of military cargo" by unfair competition, and thus were "so unreasonably low as to be detrimental to the commerce of the United States and contrary to the public interest as well." The Commission found that by willfully setting its rates

at this level AGAFBO violated §15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814.[1]

Counsel for Sapphire promptly wrote the Acting Maritime Administrator and the Maritime Subsidy Board requesting that subsidy payments to members of AGAFBO be terminated and that action be instituted to recover subsidies paid since March 29, 1965, the date AGAFBO reduced its rates.[2] The request was based on §810 of the Merchant Marine Act, 1936, 46 U.S.C. §1227, which provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with

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[1] The commission elaborated on its findings as follows:

> AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. (Footnote omitted.)

Two of the four Commissioners who participated in the report would also have found that the members of AGAFBO engaged in a conspiracy to drive Sapphire out of the trade.

[2] The functions now performed by the Federal Maritime Commission and by the Maritime Administration and its Subsidy Board were originally vested in the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840, the regulatory functions of the United States Maritime Commission were transferred to the Federal Maritime Commission, an independent agency, and the functions relating to the award, amendment, and termination of subsidy contracts were transferred to the Maritime Administration, an agency within the Department of Commerce.

another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

The Secretary of the Subsidy Board answered that the Board would "take whatever action it deems appropriate in keeping with the provisions of the Merchant Marine Act of 1936, as amended." Similar letters written after expiration of the time to appeal from the FMC's decision received a similar noncommittal reply. In fact, the Maritime Administration has taken no action whatever.

Plaintiffs thereupon instituted this suit in the District Court for the Eastern District of New York against the Acting Maritime Administrator, the Secretary of the Subsidy Board, and the Secretary of Commerce. The complaint alleged substantially the foregoing facts and sought

a declaration that §810 barred subsidy payments to the AGAFBO lines and an order compelling defendants to stop such payments and to take appropriate legal action to recover subsidies paid since March 29, 1965. Federal jurisdiction was sufficiently predicated on 28 U.S.C. §1337, which gives the district courts jurisdiction over any actions arising under any Act of Congress regulating commerce, cf., *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222, 226-27 (2 Cir. 1962), vacated on other grounds sub nom. *McCulloch* v. *Sociedad Nactional de Marineros de Honduras*, 372 U.S. 10 (1963), and 28 U.S.C. §1361, which gives the district courts jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[3] On defendants' motion the complaint was dismissed for failure to state a claim on which relief could be granted.[4] The plaintiffs have appealed.

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[3] We thus need not consider the mooted question whether §10 of the APA, 5 U.S.C. §§701-04, constitutes an independent basis for federal jurisdiction. See Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 326-31 (1967).

[4] The defendants also moved to dismiss the complaint for improper venue and for failure to join indispensable parties, or, in the alternative, for a transfer to the District of Columbia under 28 U.S.C. §1404 (a). The court below found it unnecessary to pass on these points in view of its holding that the complaint failed to state a cause of action.

While the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants, we are concerned that disposition of the action in their absence "may . . . as a practical matter impair or impede" their ability to protect their interests in the subject matter of this litigation. F.R. Civ. P. 19. Accordingly, if the district court should require their joinder or if they should intervene, we would not wish the district court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention.

Two major issues are presented: Whether plaintiffs have standing to sue, and if so, to what extent the acts complained of are unreviewable because they are committed to agency discretion. Neither question can be answered without a close examination of the statute to determine what interests it was designed to protect and how it was designed to protect them. It is unfortunate—though not surprising—that §810 does not deal expressly with a situation where the Maritime Administrator refuses to take steps concerning subsidy payments to violators; since it does not, we must analyze the statutory scheme as a whole and the legislative history of the Act to arrive at a judgment of what Congress would have wanted done if this problem had occurred to it.

At the outset we must reject the suggestion of the district court that because the statute is difficult to interpret, its interpretation is a matter entirely within the agency's discretion. As Professor Jaffee has said, "Discretion . . . is not self-defining; it does not arise parthenogenetically from 'broad' phrases. Its contour is determined by the courts, which must define its scope and its limit." Jaffe, Judicial Control of Administrative Action 572 (1965). We deal here with an issue requiring reconciliation of two conflicting statutory purposes—the general policy of the Act to build up the American merchant marine through subsidy payments and the direction of §810 for withdrawal of those subsidies when they are used to hurt rather than help. "The question in each case of consistency with statutory purpose is addressed to the judge." *Id.* at 575.

The Merchant Marine Act, 1936, §§501-610, 49 Stat. 1995, provided a new method of subsidizing American-flag shipping, primarily by construction-differential and operating-differential subsidies. In the course of debate, Senator

O'Mahoney of Wyoming and Senator Clark of Missouri brought up the case of a subsidized American-flag line which by a conference agreement with foreign lines was "crushing out of existence an American line which enjoys no subsidy." The victim had assured the committee that "without any subsidy, if removed from the incubus of this conference and of the subsidy which is granted to the American subsidized line . . . [it] could compete with all the lines of the world." 80 Cong. Rec. 9921 (1936). Senator O'Mahoney asked Senator Copeland of New York, who was in charge of the bill:

> Would it not be a simple matter to provide by amendment that no subsidy of any kind or character shall be paid to any shipping line or shipping concern which has entered into an arrangement to destroy any other American line? *Id.* 9922.

Senator Copeland undertook to "consult the experts and see if they can choose language to cover what the Senator has in mind." *Id.* The next day Senator O'Mahoney offered as an amendment what became §810. After referring to the evil "of paying a subsidy to an American line which was in truth and fact engaged in a conspiracy with foreign lines to discriminate against another American line," he stated, more broadly, that the amendment would "make it clear to the [United States Maritime] Commission that it is the intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with other lines, including those operating under foreign flags, to crush American competition."[5] He added:

> In order to give an opportunity to those who may be injured by illegal combinations of the kind I

[5] Apart from the language of §810 itself, this statement answers defendants' contention that the statute is inapplicable here because AGAFBO was composed solely of American lines.

> have described to protect themselves I have incorporated in this amendment the principle of section 4 of the Clayton Act which permits the victim of such unfair practices to sue for treble damages.

Senator Copeland made no objection and the amendment was adopted. 80 Cong. Rec. 10075-76 (1936).

The legislative history demonstrates that termination of subsidies was not designed to be a purely penal measure, although quite likely the punitive effect was considered a desirable byproduct. The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim. We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors, although here the duty of the Administrator may be less absolute than in the obligation to cease payments to current violators. In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made. Recovery of such payments imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him.[6] Although the statute does not expressly authorize the Maritime Administrator to recover subsidies improperly paid in the past, common law principles would permit

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[6] The district court thought that withdrawal of the subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitted to the routes and subsidized. Apart from the question whether any such lines are waiting in the wings, Congress felt that subsidy payments to violators did affect the competitive position of the victim and we see no reason why we should or could reject that conclusion.

this under the subsidy contract in the absence of a statutory prohibition, and we find no such prohibition here. On the other hand, we do not believe that §810 protects the interest of a carrier in having former violators barred from ever receiving subsidy payments despite their return to the paths of virtue. In fact, we do not think §810 even authorizes the Administrator to take such a step. So far as concerns payments, as distinguished from recoveries, the statute is mandatory where applicable, contrast §§606(1), 806(c), 46 U.S.C. §1176(1), 1228, and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American merchant marine.

Construing the statute as we do, we think Sapphire has standing to question the Administrator's failure to seek recovery of the subsidies paid during the period of violation. Since we find that §810 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past, it follows that this interest is legally protected, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-7 (1968), and that disregard of it is a "legal wrong" within the meaning of §10(a) of the Administrative Procedure Act, 5 U.S.C. §701. While Sapphire is not presently competing with the AGAFBO lines, we deem that irrelevant in the circumstances of this case. Sapphire was forced out of business by the violation of §810, and plaintiff Safir stated in an affidavit that he desired to return to the shipping business as soon as possible. Without deciding whether a potential competitor or a former victim who has washed his hands of the business would have an interest protected by §810, we hold that an interruption of operations like that here does not sufficiently alter the victim's interest to take it out of the

protection of §810 with regard to raising the issue of the Administrator's refusal to seek recovery of past payments.[7]

The Government contends that even if plaintiffs have standing, the Administrator's failure to act is a matter within his sole discretion and therefore neither reviewable under §10 of the APA, 5 U.S.C. §701(a)(2), nor the proper subject of an order in the nature of mandamus, cf. 28 U.S.C. §1361.[8] The arguments come to the same thing and we reject them both. While the Maritime Administrator may have some discretion in connection with the recovery of past subsidies as distinguished from payments to current violators, the discretion is not unlimited. Cf. *American Mail Line, Ltd. v. Gulick*, 411 F. 2d 696 (D.C. Cir. 1969); *Moore-McCormack Lines, Inc. v. U. S.*, 38 U.S.L.W. 2112 (Ct. Cl. July 16, 1969). Specifically, he may not refuse to proceed against the AGAFBO lines without at least considering the interest of the victim, about which Congress

[7] 28 U.S.C. §1361 speaks of "a duty to the plaintiff" rather than of a "legal wrong." The quoted language, proposed by the Department of Justice, was accepted by the sponsors of the legislation as incorporating the law on the availability of mandamus. We think that under a rational law of mandamus such an order is available to any one entitled to review under §10(a) of the APA and seeking affirmative official action. See generally Byse & Fiocca, *supra*, note 3, 81 Harv. L. Rev. at 316, 320.

[8] The Government also argues that the district court was correct in finding that the provision of a private treble damage remedy created a strong implication that the statute authorized no further relief to a citizen. We disagree. The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability of further relief consistent with the statutory scheme. Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which §810 was aimed, namely, that public moneys have been used to assist some citizens to hurt others in a manner inimical to the interest of the United States.

was so concerned. There may be other limits on his discretion, but we need not decide this now. If plaintiffs' allegations are true, the Maritime Administration was at least required to make a considered decision whether to recover the subsidies paid in the past. An answer will reveal whether it has done this and, if so, whether on grounds consistent with the statute. For the present we ask only that the Maritime Administration give clear indication that it has properly exercised the discretion with which Congress has endowed it. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941).

The order dismissing the complaint for failure to state a claim on which relief can be granted is reversed and the cause is remanded for further proceedings consistent with this opinion.

Order and Opinion of Dooling, D.J.

Reported in 297 F. Supp. 630.

DOOLING, D. J.

Plaintiffs sue to compel the defendant public officers (a) to cease paying operating differential subsidies to ocean carriers who were members of a "conference" (Atlantic and Gulf American-Flag Berth Operators, or AGAFBO), and (b) to sue the carriers to recover subsidies heretofore paid to them. The ground of the complaint is that the Federal Maritime Commission determined on December 12, 1967, that AGAFBO had reduced its rates to a noncompensatory and unreasonable level in an attempt unfairly to compete with plaintiff Sapphire Steamship Lines, Inc., that the rates so knowingly fixed

were so unreasonably low as to be detrimental to the nation's commerce and therefore violative of 46 U. S. C. §817(b)(5), that in consequence AGAFBO's rate reduction violated 46 U. S. C. §814, and that the Maritime Commission's determination of violation mandated the defendants to invoke 46 U. S. C. §1227 which (in part) provides:

> "It will be unlawful for any contractor receiving an operating-differential subsidy . . . to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> "No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Defendants have moved to dismiss on the grounds that venue is improper, that the complaint fails to state a claim on which relief can be granted, and that indispensable parties—the subsidized carriers—have not been joined. Alternatively defendants seek a transfer to Washington, D. C. under 28 U. S. C. §1404(a).

Order and Opinion of Dooling, D.J.

It is concluded that the motion to dismiss must be granted.

On venue it is enough to say that if the action were maintainable, venue as to the individual plaintiffs would appear to be correct under 28 U. S. C. §1391(e)(4), and that the proper venue as to Sapphire cannot be determined as a matter of fact on the present papers, assuming, as is likely, that under Section 1391(e)(4), the residence of a corporation is at its principal place of business or at its principal office in its state of incorporation.

Plaintiffs' essential argument in support of the complaint is that the Maritime Commission's determination that AGAFBO violated 46 U. S. C. §814 (Section 15 of the Shipping Act), by setting conference rates that were contrary to 46 U. S. C. §817(b)(5) [Section 18(b)(5) of the Shipping Act] because so unreasonably low as to be detrimental to the nation's commerce, made it the unqualified and absolute duty of the defendants to cut off subsidy payments to the AGAFBO carriers and to sue to recover past subsidy payments from them. The argument continues—that plaintiffs, as the competitor against whom the alleged predatory rates were made, and its proprietors, have standing to enforce the duty by this suit, treated either as a species of administrative review under the Administrative Procedure Act, or as a suit for mandamus or prohibition (5 U. S. C. §701, et seq.; 28 U. S. C. §1651).

Plaintiffs show no right to the relief they seek under the Administrative Procedure Act. They are not persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" as 5 U. S. C. §702 requires. To put the matter in perspective: if the Maritime Com-

mission had authorized AGAFBO to charge predatory rates until Sapphire ceased to offer its low rates, plaintiff Sapphire would no doubt be entitled to seek judicial relief against the agency action under Section 702. But it has no competitive interest in seeing AGAFBO's carriers punished by the defendants' withdrawal of the subsidies, for that is unrelated to the rate matter and to plaintiff Sapphire's competitive shipping interest: other innocent lines may at once be admitted to the routes and subsidized. Plaintiff Sapphire's legal interest is bounded by the agency-regulated conference rates, their legality, and their effect on its own independent rates, and its legal interest does not extend to the defendants' imposing the punitive sanction. *Cf. Berry* v. *Housing and Home Finance Agency*, 2d Cir. 1965, 340 F. 2d 939; *Harrison-Halstead Community Group, Inc.* v. *Housing and Home Finance Agency*, 7th Cir. 1962, 310 F. 2d 99.

46 U. S. C. §1227 (Section 810 of the Merchant Marine Act, 1936) certainly confers private rights of action: it grants a triple damage remedy to anyone injured in his business or property by a subsidized carrier's participating with other carriers in an agreement or practice which is "unjustly discriminatory or unfair to any other citizen . . . who operates a common carrier by water" with American flag vessels on any "established trade route" to and from United States ports. But the prohibition against the paying of subsidies to an operator who violates the section is not susceptible of interpretation as creating by implication a second and distinct private right, a right to coerce the defendants to withdraw any further subsidies. As noted above, the "injured" carrier under Section 1227 has no "right" to have the "established trade route" free of subsidized competition (since other subsidized carriers may

replace the offending carriers); rather, it has a "right" only to be free of "unjustly discriminatory or unfair" concerts of action by subsidized carriers. And the very existence of the triple damage remedy (which plaintiff has invoked by an action in the District of Columbia) for an invasion of that "right" tends strongly to suppress any possible implication of a second private right to have the offending carriers subsidies terminated. See *Isbrandtsen Co.* v. *The Federal Maritime Board*, D. C. 1958, 159 F. Supp. 884. Finally, withdrawal of the subsidy, if thought of in terms of its effect on competition with the "injured" carrier on the "established trade route," comes too late to ameliorate the competitive disadvantage, since it would appear that it cannot occur in the typical case until after the unfair or discriminatory practice has been terminated by Commission action under Section 15 of the Shipping Act (46 U. S. C. §814). The prohibition of further subsidy payments is, it must be concluded, a matter of peculiarly public concern and not of private interest. *Cf. Rural Electrification Administration* v. *Northern States Power Co.*, 8th Cir. 1967, 373 F. 2d 686, 692-696; *Kansas City Power & Light Co.* v. *McKay*, D. C. Cir. 1955, 225 F. 2d 924, 932. Note *Hardin* v. *Kentucky Utilities Co.*, 1968, 390 U. S. 1, 5-7 and note 7.

It should be added that *Flast* v. *Cohen*, 1968, 392 U. S. 83 applies by its terms only to cases challenging the disbursement of federal funds as violative of the First Amendment. It cannot help plaintiffs' case here.

Viewed as an action for mandamus the suit must fail because the acts it seeks to coerce are not clear and unconditional duties that defendants are unqualifiedly obligated to perform but are discretionary acts of responsible government requiring interpretation of a statute of some difficulty.

and the evaluation of the conduct of each of the subsidized carrier members of the conference. Examination of the Maritime Commission decision discloses that it is concerned primarily with the AGAFBO rate reductions, and it does not consider the individual role of each AGAFBO carrier. The rates condemned were in effect for eleven months and had been terminated (it may be because of Sapphire's lack of success) before the Commission made its findings. The literal reading of the sentence prohibiting any subsidy payment to any carrier "who shall violate this section" by the very rigor of its terms presents problems of interpretation. Since the consequences are so grave must "violation of [the] section" be determined by the defendants upon an independent review of the duration and impact of the rate or practice, the justification advanced for it, the degree of the individual carrier's complicity in the practice or rate and other factors relevant and appropriate to a determination that is to result in the loss of all subsidies and not simply in a termination of the rate as predatory or the practice as discriminatory? Must arrest of subsidy payments be permanent and extend to all the carrier's subsidies for vessels in all its trade routes? That is, does the language require a permanent blacklisting of the carrier? Is the statute, if unqualified in depriving the carrier of any *right* to continued subsidization, a mandatory and unconditional requirement that the government officials terminate payments in every case of established "violation" without exception, or is there a discretion in the government officials to temper the rigor of the statute to the circumstances of reported transgression? These and many other questions must arise in interpreting and invoking the seemingly simple command of a single brusque sentence embedded in a complex of statutes reflecting and reconciling converging sets of Congressional policy determinations. They do not

begin to be answered by the Maritime Commission's decision that the rate reduction transgressed Sections 18(b)(5) and 15, 46 U. S. C. §§817(b)(5) and 814. Hence that decision could not be the foundation of a mandamus commanding the defendants to terminate the subsidies; the defendants' responsibilities in the premises were of a larger and more complex order and involved exercises of governmental discretions of marked difficulty. See *Adams* v. *Nagle*, 1938, 303 U. S. 532, 542-544; *Panama Canal Co.* v. *Grace Line*, 1958, 356 U. S. 390, 317-319 [the language of Section 10 referred to is now 5 U. S. C. §701(a)(2)]; *Mitchell* v. *McNamara*, D. C. Cir. 1965, 352 F. 2d 700.

As the action is not maintainable it is unnecessary to decide whether the subsidized carriers would not be indispensable parties and the trustee in bankruptcy of plaintiff Sapphire, a required additional plaintiff or the sole proper representative of Sapphire's claims. Similarly, while good sense, economy of effort and convenience suggest the desirability of a transfer to the District of Columbia, it is not necessary to decide that matter.

Accordingly, it is

ORDERED that the motion to dismiss the complaint, on the ground that it does not state a claim upon which relief can be granted, is granted and the remaining motions are not passed upon; and the Clerk is directed to enter judgment that plaintiffs take nothing and that the action is dismissed with costs as taxed by the Clerk.

Brooklyn, New York
February 20, 1969.

JOHN F. DOOLING, JR.
U. S. D. J.

Complaint for Review of Agency Action, Mandamus, Declaratory and Other Relief

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The above named plaintiffs; for their complaint against the above named defendants, by their attorney Isadore B. Hurwitz, allege:

First: This action seeks judicial review to compel both agency action being unlawfully withheld and agency action being unlawfully continued, as hereinafter appears. The agency involved is the Secretary of the United States Department of Commerce, the Acting Maritime Administrator, Maritime Administration of the United States Department of Commerce and the Secretary of the Maritime Subsidy Board, Maritime Administration, United States Department of Commerce. This action arises and this Court has jurisdiction by virtue of the following statutes: 46 U. S. C. 1227 (Merchant Marine Act of 1936); 5 U. S. C. 702, 703, 704, 706 (the agencies generally); 28 U. S. C. 2201, 2202 (Declaratory Judgment); 28 U. S. C. 1361 (Jurisdiction); 28 U. S. C. 1337.

Second: Plaintiff Sapphire Steamship Lines, Inc. (an American Flag Carrier referred to as "Sapphire") is a corporation organized and existing under the laws of the State of Delaware, and had its principal place of business at 41 Flatbush Avenue, Brooklyn, New York.

Third: Plaintiff Marshall P. Safir is a natural person residing at 8 Soundview Lane, Great Neck, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

Fourth: Arnold Weissberger is a natural person residing at 1764 Bay Boulevard, Atlantic Beach, New York, and is a citizen and taxpayer of the United States and stockholder and officer of Sapphire Steamship Lines, Inc.

Fifth: Defendant James W. Gulick is the Acting Maritime Administrator for the Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

Sixth: Defendant James S. Dawson, Jr. is the Secretary of the Maritime Subsidiary Board, Maritime Administration, United States Department of Commerce. The Maritime Administration has offices at 45 Broadway, New York City.

Seventh: Defendant C. R. Smith is the Secretary of Commerce of the United States ("The Secretary").

Eighth: American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., Bloomfield Steamship Company, Farrell Lines Incorporated, Grace Line, Inc., Lykes Bros. Steamship Co., Inc., Moore-McCormack Lines, Inc., Prudential Steamship Corporation, and United States Lines Company are contracting American Flag common carriers which at all relevant times herein have received and are now receiving operating differential subsidies within the meaning of 46 U. S. C. 1227.

Ninth: Atlantic & Gulf American Flag Berth Operators (hereinafter referred to as "AGAFBO"), is a conference

of American Flag Berth Operators organized to negotiate with the Military Sea Transport Service (hereinafter "MSTS") of the United States Department of Defense (hereinafter "DOD") which has been approved under Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814). Each of the common carriers listed in paragraph Eighth above was, during the relevant period herein, a member of AGAFBO.

Tenth: On May 6, 1965 the Federal Maritime Commission (not to be confused with the Maritime Administration or the Maritime Subsidy Board of the Maritime Administration) on its own motion instituted an investigation of the practices surrounding the procurement of ocean transportation of United States military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American-Flag Berth Operators), TPAFBO (Trans-Pacific American-Flag Berth Operators), WCAFBO (West Coast American-Flag Berth Operators), their respective member lines and Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp. The Military Sea Transportation Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

Eleventh: On December 12, 1967 the Federal Maritime Commission filed its decision, Docket No. 65-13, in which

it found and concluded as follows concerning the rates of the Atlantic and Gulf American-Flag Berth Operators (AGAFBO):

> 1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to section 18(b)(5).
>
> 2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).
>
> 3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

Twelfth: The foregoing decision and findings of the Federal Maritime Commission are now final, no timely review having been sought by any of the carriers involved.

Thirteenth: That at all relevant times involved in the findings of the Federal Maritime Commission referred to hereinabove, Sapphire Steamship Lines, Inc. operated as a nonsubsidized common carrier by water exclusively, employing vessels registered under the laws of the United States, on established trade routes from and to United States ports. It was in direct competition with the members of AGAFBO and was harmed by the illegal payment of subsidies to the members of AGAFBO who are not

entitled to receive them. Subsidies are provided for by 46 U. S. C. 1171 through 1182 inclusive and 1191 through 1204 inclusive, and are referred to as operating differential subsidies. There are also subsidies referred to as construction differential subsidies, provided for by 46 U. S. C. 1151 through 1161.

Fourteenth: 46 U. S. C. 1227 provides as follows:

> "Sec. 1227. Agreements With Other Carriers Forbidden; Withholding Subsidies; Actions by Injured Persons for Damages.
>
> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect

to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Fifteenth: Upon information and belief, the members of AGAFBO have received subsidies of both kinds, totaling in excess of $600 million and are continuing to receive subsidies in violation of the statute, 46 U. S. C. 1227.

Sixteenth: On December 21, 1967 the plaintiffs requested the defendants to desist from making further payments of subsidies of any kind and to take appropriate action to recover subsidies which had been paid from March 25, 1965 to members of AGAFBO.

Seventeenth: Upon information and belief, that although the defendants stated they would take whatever action was deemed appropriate, no action whatever has been taken either to recover whatever subsidies had already been paid or to refrain from continuing to make further subsidy payments.

Eighteenth: The action and lack of action of the Secretary of the United States Department of Commerce is implemented by defendants James W. Gulick and James S. Dawson, Jr. in their official capacities. These actions and implementations thereof are agency actions subject to judicial review and appropriate judicial declaration and relief.

WHEREFORE, plaintiffs demand judgment for the following relief:

A. A judicial declaration adjudicating that the making of any subsidy payment of any kind out of the funds of

the United States to the carriers who were members of AGAFBO during the time period covered by the decision of the Maritime Commission Docket No. 65-13, is illegal in violation of 46 U. S. C. 1227;

B. That an order of prohibition be issued prohibiting and enjoining the defendants from continuing to make such subsidy payments;

C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made;

D. That plaintiffs have such other and further relief as may be just and appropriate, together with the costs and disbursements of the action.

ISADORE B. HURWITZ
Attorney for Plaintiffs

Affidavit of Marshall P. Safir in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York
County of New York

MARSHALL P. SAFIR, being duly sworn, says: I wish to apprise the Court of the following additional facts:

I am a citizen and taxpayer of the United States and I operated a common carrier by water exclusively employing vessels registered under the laws of the United States on an established trade route from and to a United States port or ports, from March 1965 to March 1967.

It is my desire to return to the business of operating United States Flag Ships as soon as possible. The continuance of the payment of subsidies to these firms represents a bar to my re-entry into the business. The abuse of the subsidy privilege denies Americans the equal opportunity to compete in our free enterprise system. Predatory tactics used against me by the steamship lines, as set forth in Federal Maritime Commission decision in docket 65-13, combined with the fact that these steamship lines are receiving millions in government subsidies to facilitate these monopolistic practices is ample testimony to any American citizen's inability to re-enter the trade unless the cost of doing business is equalized.

MARSHALL P. SAFIR

(Sworn to by Marshall P. Safir, September 20, 1968)